
**ADVISORY COMMITTEE
ON
EVIDENCE RULES**

November 5, 2025

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November 5, 2025

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TAB I

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

November 5, 2025

I. Committee Meeting---Opening Business

Opening business includes:

- Approval of the minutes of the Spring 2025 meeting.
- Report on the June 2025 meeting of the Standing Committee.

II. Machine Learning and Proposed Rule 707

At its Spring 2025 meeting the Committee approved, for release for public comment, a proposed new Rule 707 to address the evidentiary problems raised by machine learning systems. The proposal was approved by the Standing Committee; the public comment period began on August 15 and ends in February.

At this meeting, the Committee will consider the comments submitted so far, as well as some issues raised by the Reporter that might be tentatively resolved. Behind Tab II is the Reporter's memorandum on proposed Rule 707.

III. Deepfakes and the Federal Rules on Authenticity

At its last five meetings, the Committee has been working on a possible amendment to address the evidentiary challenges raised by "deepfakes." The Committee has prepared, but not approved, a new Rule 901(c) that would require the opponent to provide evidence sufficient to support a finding that a challenged item was a deepfake; if that happens, the proponent would then have to show that the item is more likely than not authentic.

Behind Tab III is the Reporter's memorandum on deepfakes and possible Rule 901(c).

IV. Proposal to Amend Rule 609

At its Spring 2025 meeting the Committee approved, for release for public comment, a proposed amended Rule 609 that would make two changes: 1. The balancing test in Rule 609(a)(1)(B) would provide that a non-falsity conviction is admissible against an accused only if its probative value *substantially* outweighs its prejudicial effect; and 2. The end-date for measuring whether a conviction is more than ten years old for purposes of Rule 609(b) is the date of trial.

The Standing Committee approved the proposed changes for release for public comment. Behind Tab IV is the Reporter's memorandum on comment received to date.

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November 5, 2025

V. Rule 902(1) and Indian Tribes and Nations

At its Spring 2025 meeting the Committee considered a proposal to add federally-recognized Indian Tribes and Nations to the list of public entities whose records would be self-authenticating under Rule 902(1). The Committee reviewed submissions by the DOJ and the Public Defender, and resolved to seek input from Tribal representatives. The Committee has now received some submissions from a number of Tribal representatives.

Behind Tab V is a memorandum from Professor Richter, the Academic Consultant, on the possible amendment to Rule 902(1) to add Indian Tribes and Nations to Rule 902(1). Also behind Tab V are the submissions received from Tribal representatives, as well as an additional submission from the Public Defender.

VI. Rule 803(3)

Rule 803(3) provides a hearsay exception for a statement of a declarant's "then-existing state of mind" or "emotional, sensory, or physical condition." Courts have split over two questions:

- 1) Must the statement be "spontaneous" to be admissible?
- 2) Can a declarant's statement about another person's state of mind be admissible to prove that person's state of mind and conduct?

Behind Tab VI is the Reporter's memorandum on whether Rule 803(3) should be amended to address these conflicts in the courts.

VII. Rule 703 and *Smith v. Arizona*

In *Smith v. Arizona*, the Supreme Court held that the Confrontation Clause bars a testimonial forensic report from being admitted into evidence through the testimony of an expert who did not participate in making the report. The Court implied that the Confrontation Clause would be violated if the testifying expert *relied* on the report, even if the report was not admitted into evidence.

There are now many lower court cases that have interpreted *Smith*, and many of them read the case as prohibiting the testifying expert from relying on a testimonial report as a basis of the expert's opinion. That holding is in conflict with Rule 703, which explicitly allows an expert to rely on inadmissible hearsay as a basis for her opinion.

Behind Tab VII is a report by the Academic Consultant, Professor Richter, on whether an amendment to Rule 703 should be considered in light of *Smith* and its progeny.

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VIII. Possible Change to Rule 104(a) and (b)

Rule 104(a) and (b) set out the applicable standard of proof for evidentiary determinations. Under Rule 104(a), the standard of proof for most determinations is a preponderance of the evidence. Under Rule 104(b), if the relevance of a fact is conditioned on the existence of another fact, the standard of proof for the conditional fact is evidence sufficient to support a finding.

There are at least two problems that have been raised with respect to Rules 104(a) and (b). First, the preponderance standard mandated by Rule 104(a) is not actually in the text of the rule. Second, the conditional relevance standard of Rule 104(b) is grounded in illogic. If the relevance of one fact is conditioned on another, then the probative value of each is conditioned on the existence of the other.

Behind Tab VIII is a memorandum by the Reporter, analyzing Rule 104(a) and (b) and suggesting possible amendments to rectify the problems that have been found.

IX. Suggestions for Changes to Rule 803(6) and 901

The Chair and Reporter sought input from a small group of practitioners on suggestions for changes to the Evidence Rules, with an emphasis on civil cases. One practitioner, Chloe Chetta, provided suggestions for two changes: 1) an amendment to Rule 803(6) that would provide admissibility of records that were prepared by one entity and incorporated by another; and 2) an amendment to Rule 901 to provide that production of an item in response to a discovery request is a concession of the item's authenticity. Behind Tab IX is the Reporter's memorandum on these two suggestions.

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Raleigh, NC

Reporter

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University of Pennsylvania Law School
Philadelphia, PA

Secretary to the Standing Committee

Carolyn A. Dubay, Esq.
Administrative Office of the U.S. Courts
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Advisory Committee on Appellate Rules

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Reporter

Professor Daniel J. Capra
Fordham University School of Law
New York, NY

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Honorable Richard J. Sullivan United States Court of Appeals New York, NY	Rene L. Valladares, Esq. Office of the Federal Public Defender Las Vegas, NV

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Professor Liesa Richter University of Oklahoma School of Law Norman, OK

Liaisons	
Honorable Thomas M. Durkin (<i>Criminal</i>) United States District Court Chicago, IL	Honorable Edward M. Mansfield (<i>Standing</i>) Iowa Supreme Court Des Moines, IA
Honorable M. Hannah Lauck (<i>Civil</i>) United States District Court Richmond, VA	

Advisory Committee on Evidence Rules

Members	Position	District/Circuit	Start Date	End Date
Jesse M. Furman Chair	D	New York (Southern)	Member: 2024 Chair: 2024	---- 2027
Valerie E. Caproni	D	New York (Southern)	2023	2026
James P. Cooney III	ESQ	North Carolina	2022	2028
Jordan Fox*	DOJ	Washington, DC	---	Open
Mark S. Massa	JUST	Indiana	2022	2028
Edmund A. Sargus, Jr.	D	Ohio (Southern)	2023	2026
John S. Siffert	ESQ	New York	2023	2026
Richard J. Sullivan	C	Second Circuit	2021	2026
R.L. Valladares	FPD	Nevada	2022	2027
Daniel J. Capra Reporter	ACAD	New York	1996	Open

AO Rules Committee Staff: Carolyn Dubay, 202-502-1820

* *Ex officio* representative on behalf of the Principal Associate Deputy Attorney General

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Andrew J. Pincus, Esq. <i>(Standing)</i> Hon. Daniel A. Bress <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Bankruptcy Rules	Dean Troy A. McKenzie <i>(Standing)</i>
Liaisons for the Advisory Committee on Civil Rules	Hon. D. Brooks Smith <i>(Standing)</i> Hon. Catherine P. McEwen <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Criminal Rules	Hon. Paul J. Barbadoro <i>(Standing)</i>
Liaisons for the Advisory Committee on Evidence Rules	Honorable Thomas M. Durkin <i>(Criminal)</i> Hon. Edward M. Mansfield <i>(Standing)</i> Hon. M. Hannah Lauck <i>(Civil)</i>

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Advisory Committee on Evidence Rules

Minutes of the Meeting of May 2, 2025
Thurgood Marshall Federal Judiciary Building
Washington D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on May 2, 2025, at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

The following members of the Committee were present:

Hon. Jesse M. Furman, Chair
Hon. Valerie E. Caproni
Hon. Mark S. Massa
Hon. Edmund A. Sargus, Jr.
John S. Siffert, Esq.
James P. Cooney III, Esq.
Rene L. Valladares, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Professor Catherine T. Struve, Reporter to the Standing Committee
Hon. Edward M. Mansfield, Liaison from the Standing Committee
Hon. Michael W. Mosman, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
JoAnn Kintz, Esq., Department of Justice
Elizabeth Wiggins, Esq., Federal Judicial Center
Timothy Lau, Esq., Federal Judicial Center
Carolyn Dubay, Esq., Chief Counsel, Rules Committee Staff
Bridget Healy, Esq., Counsel, Rules Committee Staff
Shelly Cox, Management Analyst, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff
Kyle Brinker, Esq., Rules Law Clerk
Samantha C. Smith, Esq., Supreme Court Fellow, Federal Judicial Center
Ebise Bayisa, Esq., Assistant Federal Public Defender
Kaiya Lyons, American Association for Justice
Susan Steinman, American Association for Justice

Present Via Microsoft Teams

Hon. Richard J. Sullivan, Member Evidence Advisory Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Tim Reagan, Esq., Federal Judicial Center
Alex Dahl, Lawyers for Civil Justice
Edith Beerdsen, Professor, Temple University School of Law

Jeffrey Bellin, Professor, William & Mary Law School
Sarah Brown-Schmidt, Professor, Vanderbilt University
Susan Provenzano, Professor, Georgia State University College of Law
Anna Roberts, Professor, Brooklyn Law School
Eileen Scallen, Professor, UCLA School of Law
Maggie Wittlin, Professor, Fordham Law School
John G. McCarthy, Federal Bar Association
Suzanne Monyak, Bloomberg Law
Jacqueline Thomsen, Bloomberg Law
Nate Raymond, Reuters
Sam Rahall
Sai

I. Welcome and Opening Business

Judge Furman opened the meeting by welcoming the Committee and other participants and attendees. He welcomed Judge Sullivan, who was participating remotely, and congratulated him on receipt of the Federal Bar Council's Learned Hand Medal the previous night and thanked him for his important work on judicial security. The Chair noted that Professor Coquillette was also participating remotely. He explained that Judge Lauck would not be participating due to attendance at a funeral and expressed condolences.

Judge Furman next welcomed Judge Bates, noting that this would be Judge Bates's last meeting as Chair of the Standing Committee. Judge Furman thanked Judge Bates for his extraordinary leadership and his many contributions to the federal judiciary. Judge Furman explained that it had been a great honor to work with Judge Bates and that he had learned a great deal from Judge Bates' excellent work on behalf of the Standing Committee. Judge Bates thanked Judge Furman and stated that it had been an honor and privilege to work with the Evidence Advisory Committee and all of its Chairs. He noted that the Committee had been extremely productive and had completed an amazing amount of work in the past 6-8 years. He thanked the Reporter and Academic Consultant for their many excellent agenda memos.

Judge Furman next welcomed Carolyn Dubay, the Rules Committees' Chief Counsel and expressed that the Committee was looking forward to working with her in her new role. He noted that Scott Myers, who staffs the Bankruptcy Procedure Advisory Committee, would be retiring in June. Lastly, Judge Furman welcomed members of the public in attendance and thanked them for their interest in the work of the Committee.

Next, Judge Furman asked if there was a motion to approve the Minutes of the Committee's Fall 2024 meeting. A motion was made and seconded and the minutes were unanimously approved. Judge Furman thanked the Academic Consultant for her work in preparing the minutes. Judge Furman noted that the Committee had only informational items before the Standing Committee at the January 2025 Standing Committee meeting and that the Committee had not received substantive feedback. Finally, the Chair directed the Committee's attention to the Rules Enabling Act and legislative updates behind Tabs 1.D. and 1.E. of the Agenda materials, noting

that proposed Federal Rule of Evidence 801(d)(1)(A) was in the pipeline to take effect on December 1, 2026, pending final approvals and transmission to Congress.

II. Proposed Amendment to Rule 801(d)(1)(A)

The Chair directed the Committee's attention to Tab 2 of the Agenda book (page 100 of the materials) and to the proposed amendment to Federal Rule of Evidence 801(d)(1)(A) that would make the prior inconsistent statements of all testifying witnesses admissible over a hearsay objection. He explained that the public comment period had closed on February 15, 2025, that the Committee had received 8 total comments, and that the comments were overwhelmingly positive. He noted that the comments, including ones from the Federal Magistrate Judges' Association, the American College of Trial Lawyers, and the National Association of Criminal Defense Attorneys were summarized in the Agenda memo. The Chair explained that comments in favor of the proposed amendment noted that the amendment would eliminate the need for confusing limiting instructions regarding the limited admissibility of prior inconsistent statements, would bring inconsistent statements into alignment with prior consistent statements offered to rehabilitate, and would correct an arguable imbalance favoring the prosecution. In light of the favorable public comment, Judge Furman expressed his opinion that there was no need to modify the proposed amendment. He proposed minor edits to the draft Committee note on page 125 of the Agenda materials to change the word "thus" to "also" in the penultimate sentence of the first paragraph, to remove the hyphen in "well-addressed" in the second paragraph, and to add a sentence to the third paragraph reading: "The rule governs admissibility not sufficiency."

The Reporter then noted that the Department of Justice had abstained from voting on the publication of the amendment for notice and comment but had decided to vote in favor of the Rule. He thanked Betsy Shapiro for her work in obtaining support for the amendment. The Reporter then explained that 22 state jurisdictions have rules regarding the substantive admissibility of prior inconsistent statements that are broader than existing Federal Rule of Evidence 801(d)(1)(A). He noted that this is an unusual degree of variation from the federal model and explained that state practice further supports the amendment of the federal provision. He explained that some edits were made to the draft Committee note to respond to matters raised in public comment and directed the Committee's attention to a red-lined version of the note in the Agenda materials at page 26-27 of the Rule 801(d)(1)(A) memo.

First, the Reporter explained that he had re-inserted the modifier "confusing" in describing limiting instructions in the first paragraph of the note, due to multiple public comments emphasizing the confusing nature of the limiting instructions given under the current rule. Second, several public comments noted that the amendment would bring consistency to the treatment of both inconsistent and consistent witness statements used at trial to impeach and rehabilitate, and the Reporter explained that he had added two sentences to the end of the first paragraph of the Committee note to highlight this point. Lastly, the Reporter explained that public comment had raised the issue of evaluating whether a prior witness statement is truly inconsistent with trial testimony and that, at the suggestion of the Chair, he had added a sentence to the very end of the Committee note explaining that inconsistency depends upon context and that the issue is for the court.

The Chair reminded the Committee that the proposed amendment to Rule 801(d)(1)(A) was an action item and that they would be voting on whether to advance the proposal to the Standing Committee. He then opened the floor for discussion of the proposed amendment.

One Committee member suggested that most courts treat the question of whether a witness's prior statement is actually inconsistent with her trial testimony as one for the jury. He queried whether adding the new sentence to the end of the Committee note, stating that the question of inconsistency is for the trial judge, would shift the burden to the trial judge to decide *before* cross-examination whether a particular witness statement is inconsistent. The Reporter explained that there is case law reviewing a trial judge's determination that a witness's statement constituted a prior inconsistent statement for error. He suggested that there was no need to invite a problem with the addition to the Committee note if there is already case law regulating this area. The Committee member responded that there should not be a system in which the trial judge has to review all witness statements prior to cross-examination to determine inconsistency. According to this Committee member, the prevailing practice is to allow the lawyer to utilize the statement during cross and then to allow the jury to decide whether it is inconsistent with the trial testimony. The Reporter suggested deleting the portion of the final sentence of the Committee note after the word "context," such that it would simply read: "As under Rule 613(b), the determination of whether a prior statement is actually inconsistent with the witness's trial testimony is dependent on context." This would eliminate any reference to the role of the trial judge.

The Chair asked whether any of the state evidence rules governing prior inconsistencies deal with the issue of context. The Reporter explained that the proposed amendment does not alter the nature or degree of any inconsistency. Rather it takes the statements that are already deemed to be "inconsistent" under existing law and renders them admissible for their truth whenever the witness is subject to cross concerning the statement. The Chair explained that he typically reviews witness statements before they are used to impeach to determine whether they are inconsistent. Another participant commented that the proposed addition at the end of the Committee note set forth only half the process surrounding prior inconsistent statements. He explained that *first*, the trial judge decides if a particular statement is sufficiently inconsistent for impeachment and then *second*, the jury evaluates the statement for inconsistency. This participant expressed concern that the suggested addition to the Committee note highlights only the judge's role and omits the role that the jury plays. Judge Bates noted that the difference was between the admissibility of a statement and its weight. He asked whether the Committee note could capture that the trial judge evaluates only admissibility and has no role in how the statement is ultimately weighed. The Chair queried whether it made sense to add a sentence to the note emphasizing that it is "ultimately up to the jury to weigh the statement." The Reporter reiterated his suggestion to end the final sentence at the word "context" and to eliminate any reference to the roles of the judge or jury. The Chair asked the Committee whether that edit would resolve concerns regarding the inconsistency determination.

Another Committee member opined that the note could have the unintended consequence of changing the approach to prior inconsistent statements and that it should expressly state that "no change" is intended. The Reporter noted that the very first sentence of the final paragraph of the

Committee note expressly states that the amendment “does not change the Rule 613(b) requirements.” Another Committee member expressed the view that there would be no harm in referencing the role that the trial judge plays in assessing inconsistency and that there was no need to delete the part of the final sentence referring to the trial judge’s discretion. Another Committee member agreed. Another Committee member asked whether the final (second) sentence of the last paragraph of the note was necessary at all. The Committee member argued that the first sentence of the final paragraph of the note was very clear that there would be no change in the existing practices around admitting prior inconsistencies and advocated for deleting the entire second sentence regarding context and judicial discretion. The Reporter agreed that deleting the entire final sentence would be optimal. The Chair noted that the concern about statements being taken out of context came from public comment. The Reporter responded that such concerns already exist and are handled by courts, and that the proposed amendment does nothing to affect those concerns.

The Committee member who originally raised a concern about the addition to the Committee note stated that deleting the final sentence of the proposed Committee note would alleviate that concern about the allocation of responsibility between judge and jury. The Chair noted the proposal to delete the final sentence of the draft Committee note and solicited Committee feedback. There were no objections from the Committee to deleting the final sentence.

Ms. Shapiro next stated that the Department of Justice has long viewed the proposed amendment as a close call, noting concerns that cross-examination delayed is not equivalent to contemporaneous cross-examination and about witnesses who deny having made a prior inconsistent statement. She further noted that the NACDL had changed its position since the Committee last considered an amendment to Rule 801(d)(1)(A) in 2018 and was supporting the proposal. She explained that the Department of Justice would accept the proposed amendment and would vote in favor of it.

The Chair solicited additional discussion on the proposal and another Committee member noted disapproval. That Committee member stated that he was not persuaded of the need for the amendment and that he expected defense counsel would come to regret supporting it. Although he views the amendment as problematic, he stated that he would not rehash old arguments. A motion was made and seconded to advance proposed Rule 801(d)(1)(A) to the Standing Committee for final approval with the friendly amendments to the Committee note and the Chair called for a vote. Eight members of the Committee voted in favor of advancing the proposal and one member voted against the proposed amendment.

III. Proposed Amendment to Rule 609

The Chair next directed the Committee’s attention to Tab 4 of the Agenda materials and to the proposal to amend Federal Rule of Evidence 609. He noted that the Committee had been considering an amendment to Rule 609 for a number of years and that the Committee’s consideration began with a presentation by Professor Jeff Bellin proposing the complete abrogation of Rule 609. The Chair explained that the Committee had rejected that proposal but was now considering a more modest amendment to add the single word “substantially” to the

balancing test applicable in Rule 609(a)(1)(B) to impeachment of a criminal defendant with convictions not involving dishonesty or false statement, in order to make that test more protective. He explained that this amendment was designed to correct cases in which inflammatory offenses or offenses very similar to the charged offense were being admitted to impeach testifying criminal defendants contrary to the intent expressed by Congress when it enacted Rule 609. The Chair explained that the Committee vote at the Fall 2024 meeting regarding retaining Rule 609 on the agenda was tied (with one member absent from the prior meeting voting to continue consideration of Rule 609) and that the proposal was now ripe for consideration. He called the Committee's attention to new Rule 609 cases decided since the Fall 2024 meeting and the summary of data regarding impeachment of criminal defendants with convictions in the Agenda memo behind Tab 4. The Chair noted the difficulty in obtaining any additional, meaningful data regarding Rule 609 impeachment.

The Chair explained that there were some concerns regarding the level of detail in the Committee note originally circulated by the Reporter and that the draft note had been significantly pared down with the help of the Justice Department. He called the Committee's attention to red-lined and clean versions of the modified draft Committee note that were circulated at the meeting. The Chair explained that the Department of Justice would support the proposed addition of the word "substantially" to the text of Rule 609 accompanied by the note as modified.

The Chair next explained that the Reporter had suggested that the Committee should also consider adding an end point to the 10-year limit on the use of convictions for impeachment under Rule 609(b). The Chair noted that Rule 609(b) contains an explicit starting date for assessing the age of convictions but includes no end date. He remarked that federal courts differ as to the ending point they utilize for measuring the age of Rule 609 convictions. The Chair explained that the Reporter had prepared two alternatives of a proposed amendment to Rule 609(b) to add an express ending point, one that uses the date upon which trial starts as the ending point and the other that uses the date of a witness's testimony. The Chair remarked that it would not make sense to propose an amendment to Rule 609 solely to include an ending point for Rule 609(b) but that it would make sense to include this as an add-on proposal if the Committee chose to propose an amendment to Rule 609(a). He called the Committee's attention to the two draft proposals for amending Rule 609(b) on page 246 of the Agenda materials, noting that the question before the Committee was whether to approve an amendment to Rule 609 for publication for notice and comment.

The Reporter informed the Committee that the changes to the draft Committee note proposed by the Department of Justice were acceptable to the Chair and to the Reporter and that they would recommend approval of the amendment with the note as edited by the Department of Justice. The Reporter raised the issue of trial judges admitting "sanitized" convictions through Rule 609 that withhold the nature of the conviction from the jury. He noted that the original draft Committee note included commentary on this practice but that the edited version says simply that sanitization is a "questionable practice." He suggested that this simplified reference would serve as a signal to trial judges to exercise caution in this area. He also noted that lawyers could try to use the acts underlying a conviction, that is itself inadmissible under Rule 609, to impeach a testifying defendant under Rule 608(b). Although the text of Rules 608(b) and 609 should be clear

that Rule 609 is the sole provision that regulates the use of conviction conduct to impeach, the draft Committee note emphasizes that point and helps to harmonize Rules 608(b) and 609.

The Chair pointed out that the draft of the proposed amendment to Rule 609 circulated at the meeting was the alternative that selected the date upon which trial begins as the ending point for measuring convictions offered as impeachment through Rule 609(b). He noted that the draft could be adjusted if the Committee wanted to choose a different date as the end point. One Committee member noted that a trial date might be set and later adjourned and inquired whether the proposed amendment to Rule 609(b) would maintain any flexibility for the trial judge to “freeze” the ending date for impeaching convictions in deciding to adjourn or continue a trial date. The Reporter explained that the risk of gamesmanship is inherent in any date selected as the end point for Rule 609(b). The Chair noted that the difference between the start of trial and any witness’s actual date of testimony is not great in most cases and agreed that all dates are subject to some strategic manipulation. He suggested that the date that trial starts is the superior ending point because it is the only one that puts the timing squarely in the hands of the trial judge. The Committee member queried whether the trial judge could change the Rule 609(b) date when deciding to change a trial date. The Reporter acknowledged that the Committee could add text to the proposed rule to allow for this but opined that the problem was such a narrow one that it did not justify a change. The Committee member suggested adding something to the Committee note giving the trial judge discretion to freeze the Rule 609(b) ending point for adjournments of trial. The Reporter reminded the Committee that it would be voting to publish the proposed amendment for public comment and that it could be helpful to wait and see what feedback is received on this point before adding anything to the rule text or Committee note. The Committee member agreed, remarking on the amazing work of the Committee in addressing Rule 609, on the collaboration from the Department of Justice, and on the creativity and perseverance of the Reporter with respect to the project.

Another Committee member agreed, noting that an amendment to Rule 609 was long overdue. He asked whether any thought had been given to modifying the starting point for measuring convictions under Rule 609(b) which currently begins at the “release from confinement.” He noted that some defendants may be impeached with a crime committed fifteen years earlier given the “bone-crushing” sentences handed down in federal court and queried whether a new starting point should be considered as well. The Reporter responded that modification of the starting point had not been considered because Rule 609(b) currently contains a clear starting point and that there is, therefore, no disagreement in the courts to be resolved on that issue. He opined that it would be a heavy lift to reconsider the express starting point in the rule at this point in the amendment process. Another Committee member suggested that public comment on the existing proposal might generate feedback on the starting date, as well as the ending point.

The Chair then thanked the Department of Justice and Ms. Shapiro for the collaboration with the Committee and the Reporter. Ms. Shapiro thanked Judge Furman and noted that the Justice Department had been opposed to a Rule 609 amendment since it first appeared on the Committee’s agenda in 2018 and noted its strong opposition to the proposal to abrogate Rule 609. She explained that the original draft Committee note had been the most problematic component of

the proposal currently before the Committee to add the word “substantially” to Rule 609(a)(1)(B). She expressed appreciation for the modified, pared-down draft Committee note that does not suggest to the many trial judges handling Rule 609 impeachment correctly that they have to change. She further noted the importance of reminding federal courts through the modified note that they are familiar with balancing tests utilizing the “substantially outweighs” language being added to the text of Rule 609(a)(1)(B). Ms. Shapiro commented that she did not think that the Department of Justice could support tinkering with the start date already embodied in Rule 609(b) and that a proposal to do so could throw a wrench into the amendment process. She also emphasized that the Department prefers the start of trial as the ending date for Rule 609(b).

The Chair then reiterated his support for the start of trial as the appropriate end point for measuring convictions under Rule 609(b) because it is the date best controlled by the trial judge. He proposed publishing the amendment proposal utilizing that date for notice and comment. The Chair then asked whether there was a motion to approve the proposed amendment to Rule 609 using the trial date as the end point under Rule 609(b) for publication. Ms. Shapiro offered a friendly addition to the first paragraph of the Committee note to add a reference to Rule 107 as another provision with a balancing test. The Reporter opined that Rule 107 would not be a good reference point because it deals with the use of illustrative aids that are not evidence. Another Committee member noted that the Committee note currently references Rule 703 as containing the same balancing test proposed for Rule 609 and noted that Rule 412(b) also contains a similar balancing test for use in civil cases. The Reporter explained that the reference to Rule 703 was an example and opined that the note did not need to list all possible balancing tests. He further suggested that adding Rule 412 would be problematic because that balance differs from others by incorporating harm to a victim as a unique factor.

The Chair then called for a vote on the proposal to approve for publication the amendment to Rule 609 described as “Alternative 2” using the trial date as the Rule 609(b) end point, along with the revised Committee note. Eight Committee members voted in favor of the proposal, and one voted against it. The Committee member who did not support the proposal opined that there is a desire to abrogate Rule 609, and that this amendment is simply part of a two-step process toward that end. Because the concerns and objections of this Committee member had not been refuted, the Committee member could not support the proposal. The Chair stated that the proposal would be forwarded to the Standing Committee to approve publication.

IV. Adding Commas to Rule 801(d)(2)(E)

The Chair noted the proposal received from Sai to add two commas to the coconspirator exemption from the hearsay rule embodied in Rule 801(d)(2)(E) and called the Committee’s attention to Tab 5 of the Agenda materials. The Chair informed the Committee that the stylists had opined that the two commas were unnecessary. The Chair noted that the federal courts are having no difficulty applying the coconspirator exception in the absence of the commas. The Committee unanimously voted to remove Rule 801(d)(2)(E) from the agenda.

V. Department of Justice Proposal to Add Tribes to Rule 902(1)

The Chair next directed the Committee's attention to Tab VI of the Agenda materials and a proposal to amend Federal Rule of Evidence 902(1), the provision that allows self-authentication of the signed and sealed records of enumerated government entities. He reminded the Committee that it had received a recommendation to consider an amendment that would add "federally recognized tribes" to the list of enumerated government entities whose records are self-authenticating from Judge Frizzell of the Northern District of Oklahoma on the eve of the Fall 2024 meeting in New York. The Chair noted that a similar proposal had been on the Committee's agenda over a decade ago and that no action had been taken on the matter at that time. He explained that the Committee had deferred consideration of the proposal in Fall 2024 pending input from the Department of Justice. He reminded the Committee that members had expressed an interest in evaluating whether such an amendment is necessary or whether there are alternate avenues for authenticating tribal records within existing Federal Rules of Evidence. Further, he noted that the Committee wished to consider whether adding tribes to Rule 902(1) would require an assessment of the rigor of tribal record-keeping across various tribes. The Chair then called the Committee's attention to a memorandum in support of the amendment by the Department of Justice on page 296 of the Agenda materials. The Department's draft amendment language on page 302 of the Agenda proposed adding "federally-recognized Indian tribe" to the list of enumerated entities whose records are self-authenticating. The Chair noted friendly amendments to add "or Nation" to the description and to remove the hyphen from the language. The Chair also noted that five federal district court judges with experience in tribal cases had submitted a letter in support of the amendment that had been shared with the Committee by email. He also noted that the Federal Public Defender had submitted a letter in opposition to the amendment at page 310 of the Agenda materials. The Chair then recognized Ms. Shapiro of the Department of Justice to explain the rationale for the proposed amendment to Rule 902(1).

Ms. Shapiro began by noting that defense counsel opposes the proposed amendment because the fact of Indian blood and tribal affiliation are part of the government's burden of proof in criminal cases and that it is defense counsel's obligation to favor obstacles to conviction because it is beneficial to their clients. She next noted that she had researched the Guam Sunshine Act (which was referenced in the Federal Public Defender's letter) and found that it was not enacted until 1999, many years after the records of Guam became self-authenticating pursuant to Rule 902(1). She explained that the government's ability to authenticate tribal records with a certificate under Rule 902(11) represented the most substantial argument against the amendment, but she argued that authentication under Rule 902(11) is substantially more difficult and can prove problematic. First, she noted that Rule 902(11) contains a pretrial notice requirement that can lead to reversal of a conviction even where there is no challenge to the authenticity of the tribal records. Second, she explained that use of Rule 902(11) ties to use of the business records exception to the hearsay rule in Rule 803(6) and that Rule 803(6) requires records made "at or near the time" of the events recorded and records that are routinely maintained as part of a regularly conducted activity. She explained that all of these elements of Rule 803(6) are being challenged by defendants with respect to tribal records. She further noted that the authenticity of tribal records was routinely subject to a stipulation prior to the Supreme Court's decision in *McGirt*, but that stipulations have become rare and challenges more frequent in the wake of that decision.

Further, Ms. Shapiro noted that all records from entities such as Guam are self-authenticating under Rule 902(1) but that the records of sovereign tribes are not afforded the same treatment. She argued that there is no rational reason to treat tribal records differently. She described the burden that the lack of self-authentication imposes on tribal governments, which have to send witnesses hundreds of miles to provide a few minutes of authenticating testimony for tribal records. She closed by arguing that the Committee need not conduct a review of the reliability of tribal record-keeping to propose addition of tribal governments to Rule 902(1) because hundreds of municipalities and other entities are already included in the provision despite variations in their record-keeping practices and absent any review of the reliability of those practices.

The Chair noted that the letter in support of the amendment sent by the district court judges also mentioned the burden of needless travel on tribal officials. The Chair asked how often a witness is required to authenticate tribal records under existing rules and how frequently Rule 902(11) certificates are being used for authentication. Ms. Shapiro explained that witnesses are being used to authenticate tribal records most of the time because tribal officials actually carry the requisite records into court and because the records include information about the defendant's Indian blood and tribal affiliation, facts which may not be recorded "at or near the time" of underlying events as required by Rule 803(6) and hence Rule 902(11). The Reporter asked whether the "events" to be recorded would occur at birth or the time of enrollment, and so would be entered at or near the time of the relevant event. Ms. Shapiro suggested that she was unsure as to when the information would ultimately be recorded by tribal officials but that the time of enrollment would be most probable – which may or may not be close in time to a tribal member's birth. Ms. Kintz, the Deputy Director of the Office of Tribal Justice of the DOJ, explained that citizenship is rarely recorded at birth and that additional steps need to be taken to establish citizenship. The Reporter queried whether the obstacles to admissibility under the hearsay exception in Rule 803(6) are separate from the problem of authentication that would be solved by adding tribes to Rule 902(1). Ms. Shapiro responded that some cases admit tribal records and some currently reject them.

The Chair next asked how often the facts of Indian blood and tribal affiliation are genuinely in dispute in a criminal case and how frequently these issues represent a box-checking exercise for the government. Ms. Shapiro suggested that these issues mostly create a box-checking exercise because defendants are not contesting their requisite tribal affiliation but are simply refusing to stipulate to it, thus putting the government to its proof and then increasingly objecting to that proof. She suggested that the prosecution is being forced to authenticate tribal records in a complex manner inapplicable to the records of other government entities.

The Chair then recognized the Federal Public Defender to offer thoughts on the proposed amendment. Mr. Valladares thanked the Chair and told the Committee that his colleague Ebise Bayisa was in attendance and could answer any Committee questions about the letter submitted by the Federal Public Defender in opposition to the proposed amendment. He explained that the issue of proving a defendant's requisite tribal affiliation for purposes of criminal jurisdiction has been around for many years and is one that has been proven routinely by the government under existing evidence rules without any problems. He suggested that the few recent cases in which this issue had arisen represented a very localized problem that is not occurring more broadly throughout the

country. Further, he opined that approval of the proposed amendment for publication would be premature given that the Committee was considering the issue for the first time. He suggested that the Committee host a symposium at its Fall 2025 meeting on the issue and invite judges and lawyers experienced in handling these cases to assess the need for an amendment to Rule 902(1).

A Committee liaison explained that he had volunteered in both Tulsa and Oregon to assist with these cases and has experience with the issue of proving tribal affiliation. He agreed that the prosecution is able to prove these points under existing rules but offered that witnesses from tribes were forced to drive 200 miles over the mountains to appear in court to satisfy the government's burden of proof. He explained that the government can establish the requisite tribal affiliation but that it is unusually difficult.

A Committee member remarked that he understood the issues but was unsure what problem the proposed amendment would be solving. He questioned whether a rule change was truly needed and opined that the Committee lacked the data it would need to propose an amendment to Rule 902(1). Ms. Shapiro responded that there is no need for the government to have to jump over burdensome hurdles in proving largely undisputed points and that the omission of tribal government records from Rule 902(1) failed to afford tribes the requisite dignity consistent with their sovereign status. The Committee member responded that he was sensitive to the dignitary issues but queried whether tribal governments would support the change to Rule 902(1) in the name of sovereignty. The Committee member suggested that the Reporter or a subcommittee could invite input from affected tribes to ascertain tribal support for the proposal. Ms. Shapiro responded that the issue was not very complex and that the Department of Justice could obtain letters from tribal organizations supporting the amendment. She argued that the Committee would receive significant input from affected constituencies if it approved the proposed amendment for publication.

The Chair stated that the issue was a very local one that may not merit a national symposium. He suggested that publication could encourage tribes to submit commentary that would be helpful to the Committee. A Committee liaison noted that there is great variability in record-keeping across different tribal governments but that the same variation also exists across the municipalities currently recognized under Rule 902(1). Another Committee member agreed that record-keeping practices across the thousands of municipalities covered by existing Rule 902(1) is extremely variable. The Committee member opined that there is no rational explanation for excluding tribal records on the basis of record-keeping practices.

Mr. Lau of the FJC suggested that it would be relatively simple to collect data regarding how often the facts of Indian blood and tribal enrollment are actually disputed in federal criminal cases by looking at jury instructions in such cases. He noted that those instructions would reveal any stipulations as to those issues. The Chair explained that the question was not so much the frequency of stipulations but the percentage of prosecutions in which these issues are “genuinely disputed” with defendants arguing that they do not, in fact, have the requisite tribal connection to support criminal jurisdiction. He questioned whether a review of cases could answer that inquiry and noted that these issues may be submitted to the jury even where the defendant does not actively contest the requisite tribal affiliation.

Ms. Kintz explained that the issue was one of respecting tribal governments and their relationship with the federal government. She argued that there is no valid reason that tribal governments should not be afforded the same respect as municipalities. She further noted that tribal citizenship is a matter that is crucial to the operation of tribes and that there is no reason to question the reliability of tribal records on this critical point. Finally, she opined that the burden being placed on tribal governments to provide this testimony in support of federal prosecutions is unjustified and substantial.

Mr. Valladares commented that he has the utmost respect for tribal sovereignty but that one of the authors of the letter in opposition to the proposed amendment is an enrolled member of the Choctaw Nation of Oklahoma. He suggested that she could speak to the issues raised by the government at a symposium and demonstrate that problems have arisen in only a couple of bad cases where the government could have successfully authenticated the tribal records at issue under existing rules. He argued that bad outcomes in a handful of cases should not justify a rule change and that no harm would be done by pausing any decision on publication to allow experts in the field to offer valuable input.

Judge Bates stated that he was interested to know the view of tribes with respect to the proposal. He questioned whether it is optimal to have the Department of Justice speak for tribes in light of the long history of the federal government taking action in connection with tribes without their input or consent. He suggested that it would benefit the Committee to have the views of the tribal governments themselves in the record given the tribal sovereignty and dignity rationale for the proposed amendment. Judge Bates opined that a symposium would not be necessary and that letters from tribal representatives would be sufficient but that the Committee should obtain tribal government input prior to recommending an amendment for publication. FJC representatives offered their support in obtaining tribal input on the proposal. Ms. Shapiro further noted that the Office of Tribal Justice has important relationships and could reach out for letters regarding the proposed amendment.

The Chair asked whether the Department of Justice was withdrawing its proposal to vote to publish the proposed amendment for notice and comment pending the solicitation of tribal input. Ms. Shapiro responded that the Department wished to advance the proposal for a vote to publish to obtain public comment and to develop tribal feedback for the record during and as part of the public comment process. A Committee member stated that the only issue to be decided is whether tribes should be treated like other government entities for purposes of Rule 902(1). He suggested that the Committee should not make that determination without first hearing from affected tribes.

The Chair noted that all Committee members were in agreement that the Committee should obtain input and feedback from tribes but that the open question was when to obtain that feedback – before publication of a proposed amendment to Rule 902(1) or during the public comment period following publication. One Committee member predicted that tribes would overwhelmingly favor the amendment and suggested publishing it for notice and comment with the option to pull back from the proposed amendment if there proved to be inadequate tribal support. The Chair then raised two points about the draft proposal. First, he noted that Federal Rule of Criminal Procedure 6(i) contains a definition of “Indian Tribe” in connection with the disclosure of grand jury

information and questioned whether a reference needed to be included in the text of the proposed rule or could be included in a Committee note. The Reporter opined that a Committee note would be appropriate. The Chair then noted an issue raised in the memorandum submitted by the Federal Public Defender regarding the dates upon which certain tribes are “federally recognized.” Committee members agreed that an amended Rule 902(1) would apply to the records of all tribes currently federally recognized regardless of the date of recognition. Ms. Shapiro agreed that the amendment would self-authenticate the records of tribes federally recognized on the date of trial.

The Reporter to the Standing Committee pointed out that the question of affording tribal governments sovereign dignity under Rule 902(1) arises in the unique context of federal criminal jurisdiction. While all tribes might agree on the general desire for dignity and sovereignty writ large, there could be varying views on tribal recognition for purposes of creating federal criminal jurisdiction. She suggested that the question of tribal dignity in this unique context is complicated and momentous. A Committee member agreed, opining that the Committee should take additional time to collect data before proceeding to publish a proposed amendment to Rule 902(1) for public comment. He suggested that the Committee would be rushing if it approved the proposal without obtaining more feedback and data and stated that he would have to vote against publication at this point out of respect for process. A representative from the FJC agreed that the implications for federal criminal jurisdiction could lead to differing views among tribes. She suggested reaching out to the National Congress of American Indians advocacy group to explain the issue and seek feedback.

The Reporter emphasized the importance of asking the right questions in order to get meaningful feedback. The Chair stated that it would be appropriate to ask tribal governments for their views before proceeding to publish a proposed amendment and suggested that proceeding without asking could be perceived as paternalistic. Mr. Valladares reiterated that an important issue remains how frequently problems of proof are actually occurring in federal trials and how significant the burden is on tribal governments to address proof problems. He noted that the issue is elemental for criminal defendants, that the Committee had not yet received a memorandum from the Reporter on the issue, and that there was no reason to rush through the amendment process.

The Chair then expressed his view that the Committee should hear from tribal governments before proceeding with publication if tribal dignity is an animating rationale for the proposal. He suggested that the Committee discuss with the FJC the ability to gather data regarding the proof problems in the cases, solicit the views of the tribes, and revisit the proposal at the Fall 2025 meeting. Ms. Shapiro stated that the Department would reach out to tribes and solicit feedback such that the proposal could be an action item for the Fall 2025 meeting. The Reporter suggested that it would be superior to include the proposal as an action item for the Spring 2026 meeting to align with the notice and comment period that runs from August through February. He suggested that the Department work with the Academic Consultant to develop a protocol for soliciting tribal input. Committee members agreed to maintain the Rule 902(1) proposal on the agenda and to await feedback and data before proceeding.

VI. Report on Federal Rule of Evidence 706 and Court-Appointed Experts

The Chair next recognized Samantha Smith, the Supreme Court Fellow at the FJC, to describe her study of Federal Rule of Evidence 706 and court-appointed expert witnesses. Ms. Smith thanked the Chair and the Committee for making time for her on the agenda. She explained that her interest in Rule 706 emanated from her time as a law clerk and in private practice where she saw expertise inaccurately relayed to the court on multiple occasions and questioned what could be done to better translate expertise to courts. Although Rule 706 authorizes federal judges to appoint expert witnesses, Ms. Smith explained that the literature on the provision suggests that this tool has little value because very few judges make such appointments and because such appointments are seen as posing threats to the adversarial process. Nonetheless, Ms. Smith noted that court-appointed experts can assist in the search for truth that is at the heart of the trial process.

Ms. Smith explained that she undertook an update of a 1993 FJC study on Rule 706 through surveying and interviewing active and senior district court judges regarding their use of Rule 706. Ms. Smith found that the usage of court-appointed experts had declined since 1993, with 20% of surveyed judges reporting use of court-appointed experts in 1993 compared to only 10% today. She also noted that the judges who reported making appointments under Rule 706 had not asked them to testify and had deployed them as advisors akin to technical advisors and special masters. She explained that Rule 706 offered a more streamlined procedure for accessing such advisory support than Federal Rule of Civil Procedure 53 that requires a more complicated process for appointing a special master. Ms. Smith further noted that trial judges utilizing Rule 706 did not compensate court-appointed experts as set forth in Rule 706. She explained that most courts had used court funds rather than party funds to compensate court-appointed experts even though Rule 706 does not provide for use of court funds in civil cases. Finally, Ms. Smith stated that the majority of federal judges who had not used a court-appointed expert cited concerns regarding the adversarial process as a rationale for avoiding an appointment. Judges expressed reluctance to interfere with party autonomy and were loath to be perceived as placing a thumb on the scale of one side or the other and risk reversal.

As a result of her research, Ms. Smith offered ideas about amendments to Rule 706 that might be explored to promote the use of court-appointed experts. First, she suggested that Rule 706 might be updated to expressly authorize use of bench and bar funds to support court-appointed experts for judges who are reluctant to charge the parties. Due to the infrequent utilization of the tool, Ms. Smith predicted that this would not overtax funding or drive up the use of Rule 706 to a significant degree. She further suggested that a Committee note to any Rule 706 amendment might highlight for trial judges other mechanisms for obtaining expertise such as technical advisors and special masters. Ms. Smith also opined that Rule 611 might be amended to provide a concrete source of authority for the use of concurrent expert proceedings (also known as “hot-tubbing” the experts). She noted that federal judges expressed significant interest in such proceedings but wanted clear authority for them.

The Chair queried whether an amendment to Rule 706 was necessary to allow for use of court funds to compensate court-appointed experts where some judges already reported such use

under the existing provision. Ms. Smith responded that some trial judges reported a reluctance to authorize use of court funds where Rule 706 does not appear to permit such use in civil cases. The Chair then inquired whether issues with Rule 706 were ones that could be resolved through improved judicial education as opposed to rulemaking. He suggested that it may be appropriate for the FJC to offer more training around Rule 706. Ms. Smith agreed that education was important and expressed her hope that her study had served an educational, as well as a research function. That said, Ms. Smith noted that several of the judges she surveyed reported looking directly to Rule 706 to determine their authority such that rulemaking might also serve an important function. Judge Furman thanked Ms. Smith for her research and for sharing it with the Committee.

VII. Proposed Amendments to Address Machine-Generated Evidence and Artificial Intelligence

The Chair directed the Committee's attention to Tab 3 of the Agenda materials and to the final issues for consideration – the authentication and admissibility of machine-generated and AI evidence. He reminded the Committee that these issues had been on the Committee's agenda since 2023 and that the Committee had been evaluating two concerns. First, the Committee had been exploring the deepfake problem and the issues around authenticating information that might be generated by artificial intelligence. Second, the Committee had been evaluating concerns regarding the admission of machine-generated evidence. The Chair reminded the Committee that members had agreed to consider a new Federal Rule of Evidence 707 regarding the admissibility of machine-generated evidence for publication. He also reminded the Committee of their agreement not to publish proposed Rule 901(c) regarding authentication of evidence potentially generated by AI but to continue developing an appropriate provision in case an emergent need arises to add a rule to keep pace with evolving technology in the courtroom. The Chair commended the Reporter for his Agenda memorandum on these subjects which he described as another tour de force. The Chair noted that the Committee had been criticized for not moving quickly enough on AI and opined that the Committee was proceeding with appropriate care and actually leading the charge on the development of rules around this challenging technology. The Chair noted that no state is as far along in the development of provisions to respond to AI.

The Chair directed the Committee's attention to page 198 of the Agenda materials and to the proposed new Rule 707 that would require "machine-generated" evidence to satisfy the requirements of Rule 702. He noted that an alternate, narrower version of Rule 707 that would regulate only "machine-learning" evidence appeared on page 202 of the Agenda materials. The Chair noted that the proposed rule regulating machine-generated evidence originally exempted "the output of basic scientific instruments or routinely relied upon commercial software" from coverage. The Chair explained that the draft rule had been altered since the Committee last reviewed it to eliminate an exception for "routinely relied upon commercial software" for fear that it was too broad an exclusion that could exempt even Chat GPT output from coverage. He noted that the draft Committee note had also been sharpened to address concerns raised by the Department of Justice.

The Reporter pointed to two additional changes to the Committee note in a handout circulated to the Committee at the meeting: 1) a new sentence acknowledging that Rule 707 would

not apply in circumstances in which the court can take judicial notice of the reliability of machine-generated evidence; and 2) a new sentence at the conclusion of the note providing that parties should adhere to notice requirements for expert testimony in admitting machine-generated evidence. The Reporter explained that notice of machine-generated evidence would be important but noted that fashioning a notice provision in rule text could prove problematic as it did in the Rule 107 rulemaking process. He opined that a Committee note reminding parties of the existing notice obligations around expert witnesses would better serve courts and litigants. The Reporter explained that the challenge in drafting Rule 707 was to demand reliability for important machine-generated evidence without being overinclusive and needlessly slowing the trial process. The Reporter predicted that federal trial judges would exercise good common sense in demanding the requisite showing in appropriate cases without requiring *Daubert* hearings for well-accepted and understood machine output.

Ms. Shapiro stated that she had conferred with many Department of Justice experts regarding electronic evidence and artificial intelligence. She reported universal concerns about a new Rule 707. First, she noted that Rule 707 would be necessary only when machine-generated evidence is offered in the absence of an expert witness. If an expert witness testifies based upon machine-generated output, that testimony would be subject to Rule 702 and Rule 707 would be unnecessary. The only time Rule 707 would serve an important function would be when such output was proffered without an accompanying witness. She noted that DOJ experts questioned when and how machine-generated data would be conveyed to a jury in the absence of a trial witness. The Reporter responded that it can happen frequently through the use of a Rule 902(13) certification. Another Committee member suggested that a summary offered as evidence through Rule 1006 might summarize voluminous machine-generated data. The Chair suggested that such evidence may be accompanied by a lay witness but could be offered without an expert on the stand. The Reporter agreed that it was probable and not just possible. Ms. Shapiro stated that Department practice is to utilize an expert witness and expressed concern that an expert conveying machine-generated data would have to satisfy both Rules 702 and 707, requiring a two-step admissibility inquiry. The Reporter suggested that only one step would be required where proposed Rule 707 simply incorporates the requirements of Rule 702. Another Committee member suggested a hypothetical in which a lay witness, such as a government agent, might testify about using facial recognition software to identify a defendant who was captured on video during a crime. He noted that this would be a lay witness relying upon AI to support his testimony.

Ms. Shapiro stated that it is the Department's view that Rule 702 already covers the use of machine-generated evidence and that proposed Rule 707 seeks to anticipate and regulate future needs. She further noted concerns that Rule 707 is overly broad and could require a Rule 702 showing for almost anything. Department experts sought to categorize output as "machine generated" or "AI" and had difficulty drawing clear lines. Ms. Shapiro noted that people are not always aware that certain devices (such as cell phones) rely upon machine learning to generate output. She argued that a rule covering all machine-generated evidence would extend beyond the AI concerns that generated the project. She noted that the DNA examples provided in the draft Committee note do not rely upon AI.

The Chair explained that the intent of Rule 707 would be to address the circumstance in which machine-generated, expert-like conclusions are offered without an accompanying expert witness. He queried whether adding language to the text of the proposed provision to expressly state that it applies only when the output is “offered without an expert witness” would alleviate some of the concerns around the proposal. Ms. Shapiro responded that such an addition would be an improvement but would be inadequate to address all of the Department’s concerns. The Reporter explained that there is significant expertise in the scientific community regarding machine-generated output and that the question for the Committee was how best to access that expertise to improve the proposed provision. He reminded the Committee that it had already hosted two symposia on these issues. He suggested that the Committee could invite more speakers to share their expertise but that it would be more productive to publish proposed Rule 707 for public comment and obtain expert feedback.

A Committee member asked that the Reporter help the Committee understand the concern to be addressed by the proposed provision. This Committee member reported never having seen machine-generated output offered without an accompanying witness and asked for concrete examples. The Reporter posited a trial in which the defense disputes what is portrayed on a video and applies artificial intelligence to alter the focus of the video but applies an AI tool that is not appropriate to the task. He suggested that this would constitute unreliable machine output that would be regulated by Rule 707. Ms. Shapiro asked whether that hypothetical posed a problem of authenticity. The Reporter replied that the issue would not be one of authenticity because the proffered video would be exactly what the defense claims it to be – an augmented version of the video. The question, the Reporter explained, would be about the reliability of the method of augmentation. The Chair noted that an article summarized by the Reporter on page 16 of the Agenda memo offered four examples of how machine-generated evidence might be offered at trial without a testifying expert.

Judge Bates noted that the draft of Rule 707 covered output that would be subject to Rule 702 if testified to by a “human” witness. He questioned whether the provision meant to cover circumstances where there is no “expert witness” and whether the word human could be replaced with the word “expert” to better capture the intent of the Rule. Second, Judge Bates noted that the title of proposed Rule 707 is “Machine-generated Evidence” but that the text of the provision does not utilize the term “machine-generated evidence” and that the Evidence Rules never provide a title that is not used in the text of the rule. Ms. Shapiro queried whether the title of the provision might be changed to “Expert-like Machine-Generated Evidence” but the Reporter noted that this terminology did not appear in the rule text either. The Chair commented that Rule 807 is titled the “Residual Exception” even though that terminology appears nowhere in the text of the rule.

The Chair then noted that he had not yet seen this type of evidence being used in his courtroom in the absence of an accompanying expert but that it was likely that he would soon. Ms. Shapiro reported that a defendant in a Florida stand-your-ground state prosecution had offered virtual-reality evidence of the underlying events from the defendant’s perspective and that the trial judge had taken admissibility under advisement after experiencing the virtual-reality presentation. She noted that the judge was deciding whether to admit the evidence using existing evidentiary rules.

Another Committee member asked whether Rule 707 ought to demand “accuracy” as opposed to the “reliability” required by Rule 702. He noted that the defendant in the virtual reality scenario may or may not be using a “reliable method” to create his virtual reality but that the question for the jury was whether it revealed an “accurate” depiction of the underlying events. The Reporter responded that the issues with machine-generated output mirror those under Rule 702 which requires reliability. Another Committee member opined that the Committee would need to address machine-generated evidence in the future but that a new rule was still premature. He noted that parties are building large language models that can be asked to identify, for example, the circumstances that correlate with bad outcomes for labor and delivery. He suggested that such large language models are capable of identifying “shift changes” or even certain personnel with bad outcomes. This Committee member predicted that litigants would try to admit such evidence in the future and that machines could very well be asked to “testify.” He suggested that the Committee should continue developing a rule to regulate such evidence, but that adoption of a rule needed to await future developments.

The Reporter responded that the Committee needed to craft a provision that would be sufficiently general to accommodate future developments and opined that the Rule 707 proposal to incorporate the Rule 702 standard could achieve that. The Chair agreed that rulemaking is challenging in this space because technology develops at lightning speed and rulemaking proceeds very slowly. He suggested that it would take several years to launch a helpful rule if the Committee waits to take action. The Reporter emphasized the importance of obtaining public comment on the proposal. Another Committee member expressed concern about machine-generated output offered by a lay witness who cannot explain the process followed to generate the output. He opined that the Rule 707 proposal addresses that concern by applying Rule 702 to evidence that otherwise might slip through. The Reporter also reminded the Committee that a decision to publish the provision would generate public hearings as well as public comment. He predicted that the Committee would receive significant, helpful information from subject matter experts in the course of public hearings. Professor Coquillette remarked that he had never seen a rulemaking issue as important or difficult or a better Agenda memorandum. He strongly suggested approval of the draft to obtain public comment.

Judge Bates then inquired about the interaction between Rule 902(13) and proposed Rule 707, asking whether a litigant would have to satisfy both provisions to admit machine-generated evidence. The Reporter answered that litigants would have to satisfy both. Judge Bates then opined that the Committee note to proposed Rule 707 should address that interaction. The Chair suggested adding commentary to the note regarding application of Rule 707 when machine-generated output is introduced without a witness through Rule 902(13). Another Committee member noted that Rule 902(13) is often used to prove a defendant’s Google search terms or the like without resort to any AI. Judge Bates expressed concern that any litigant seeking to utilize Rule 902(13) would need to satisfy Rule 707 even though the litigant is not using an expert. The Chair clarified that Rule 707 would apply to machine-generated output certified through Rule 902(13) only if that output would constitute expert testimony if testified to by an expert witness. The Reporter agreed and noted that Rule 707 would distinguish the Rule 104(a) reliability standard from the Rule 104(b) authenticity standard. Ms. Shapiro called attention to the exemption from Rule 707 for “basic scientific instruments” and expressed concern about the ambiguity of that exemption and about *Daubert*

hearings for every piece of machine-generated evidence. The Reporter responded that there will be problems of designation that will need to be worked out under the provision, that trial judges are unlikely to hold *Daubert* hearings to assess the admissibility of thermometer readings, and that obtaining public comment on the proposal is critical for that line-drawing to be done right.

A Committee member expressed concern that the proposed addition to the Committee note to suggest that Rule 707 applies when a Rule 902(13) certification is used will subject output that is not expert in nature to Rule 707. Another Committee member asked whether it would help to modify the note to specify that Rule 707 applies to only a subset of Rule 902(13) certifications where the output is expert-like. Judge Bates then asked whether a reference to Rule 702 is the best way to regulate machine output that effectively is acting as an expert witness. He expressed continuing concern that Rule 707 could have the unintended consequence of regulating all Google search results certified under Rule 902(13). Another Committee member agreed, noting that a defendant may search “where can I buy a gun?” and the fact of the search is admitted through Rule 902(13). The Reporter stated that Rule 707 would not govern because such output would not be expert in nature. Another Committee member agreed that Rule 707 would not cover such output because it would regulate machines offering opinions that cannot be cross-examined and would not apply to the fact that a particular internet search was conducted. The Reporter proposed a new paragraph for the Committee note to address the interaction with Rule 902(13) that would read: “If the machine output is the equivalent of expert testimony, it is not enough that it is authenticated under Rule 902(13). That rule covers authenticity but does not assure reliability under the preponderance of the evidence standard applicable to expert testimony.”

Judge Furman then noted that the draft text of Rule 707 had been modified to require Rule 702 to be satisfied whenever output is offered “that would be subject to Rule 702 if testified to by an expert witness.” He noted the tautological problem of requiring Rule 702 to be satisfied whenever an expert would have to satisfy its requirements because *all* expert witnesses have to satisfy Rule 702. Judge Bates agreed that *everything* an expert witness testifies to is subject to Rule 702. The Reporter queried whether the text should be modified to govern when machine-generated output “yields an opinion” that would be subject to Rule 702. Ms. Shapiro asked whether the rule would regulate only AI and machine learning since only AI can offer an “opinion.”

The Reporter reiterated the importance of obtaining public comment on the proposal and argued that the addition of the word “expert” in place of the word “human” had created the tautology in the rule text. He suggested that simply removing the word “expert” such that the rule would regulate output that “would be subject to Rule 702 if testified to by a witness” would resolve any difficulty. The Reporter suggested that the relationship between Rule 707 and 902(13) could be addressed by the addition of the language previously discussed to the committee note.

The Chair then asked whether there was a motion to publish Rule 707 with an assumption that the provision is not necessarily proceeding to final approval due to many remaining questions. He added that the Committee would not be committing itself to adding Rule 707 to the Federal Rules of Evidence by publishing it for notice and comment. A Committee member commented that the public would likely perceive Rule 707 as on track for final approval despite those Committee assumptions. Another Committee member asked whether it would be helpful to replace

the words “output of a process or system” in rule text with “machine-generated evidence” to signal that Rule 707 would be narrower than Rule 902(13). Judge Bates asked whether the text should also be clarified to state that it applies when machine-generated evidence is offered without any witness. The Chair responded that it should apply whenever machine-generated evidence is offered without an “expert witness” because such output could be offered through a lay witness. Committee members agreed that Rule 707 would be improved by modifying it to read:

Rule 707. Machine-Generated Evidence

Where machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court must find that the evidence satisfies the requirements of Rule 702(a)-(d). This rule does not apply to the output of basic scientific instruments.

Ms. Shapiro then asked whether the bullet point in the draft Committee note on page 74 of the Agenda materials offering DNA software as an example could be deleted. Committee members agreed. The Chair then asked if there was a motion to publish Rule 707 as edited, along with new note material on Rule 902(13) and with the bullet point about DNA software deleted. Eight members of the Committee voted in favor of a motion to publish, and the Department of Justice representative voted against the proposal. One Committee member stated that his vote in favor was to publish the draft to invite comment but not for ultimate adoption. The Chair commented that that was true for his vote as well. The Reporter stated that the Committee’s report to the Standing Committee would highlight the provisional nature of the proposal.

The Chair next turned to the issue of deepfake evidence and the draft Rule 901(c) that the Committee had developed but had decided not to publish for notice and comment. The Chair asked Committee members whether the intention to hold Rule 901(c) for consideration remained, whether the Committee wished to propose publication of that provision alongside Rule 707, or whether the Committee wished to remove the deepfake issue from its agenda. The Chair also noted that the Reporter’s Agenda memo described a new, but similar proposal regarding deepfakes submitted by Professor Delfino. He pointed the Committee to the proposal on page 180 of the Agenda materials and noted that the Reporter preferred Professor Delfino’s use of the term “generative AI” in Rule 901(c) and had drafted an updated version of Rule 901(c) appearing on page 196 of the Agenda materials.

The Reporter agreed that the term “generative AI” better captured the concerns regarding deepfakes because it is generative AI that is capable of creating such fake evidence. Therefore, the new draft eliminates the reference to “electronic evidence” and tailors the draft provision to an “item of evidence” that has been fabricated by “generative artificial intelligence.” The Reporter also explained that the problem of the “liar’s dividend” (or arguments about deepfake evidence targeted to genuine evidence) could be addressed effectively in the Committee note given the existing mechanisms for preventing unfounded arguments about deepfakery. He also noted that unfounded generic demonstrations about the creation of deepfake evidence could also be excluded through Rule 403. The Reporter also explained that the deepfake problem could apply to evidence that is self-authenticating under Rule 902 and pointed out that text was added to draft Rule 901(c)

to clarify its application to self-authenticating evidence under Rule 902. The Reporter reminded the Committee that proposed Rule 901(c) utilizes a burden-shifting mechanism that requires the *opponent* of evidence to provide sufficient information for a reasonable jury to find fabrication under Rule 104(b) before shifting the burden to the *proponent* of the evidence to show that it is genuine by a preponderance of the evidence pursuant to Rule 104(a). The Reporter explained that there had not been much development in the caselaw since the Fall 2024 meeting and that most courts reject deepfake claims made without support.

The Chair thanked the Reporter and identified several questions for the Committee's consideration. First, he asked Committee members whether a flood of deepfake evidence was on the horizon since that flood had yet to arrive. Second, he queried whether the existing rules are adequate to address the problem of deepfakes given that trial judges appear to be handling the deepfake claims that have been made capably. Finally, he sought the Committee's input as to whether to continue developing Rule 901(c) as a draft to keep in reserve in the event that deepfake evidence or arguments begin flooding the courts, or whether to publish the proposal for comment along with Rule 707. The Reporter distinguished proposed Rule 707 and proposed Rule 901(c), explaining that the Committee had a great deal to learn about the use of machine-generated evidence but that there was not a great deal more to examine regarding the problem of deepfakes. He suggested that there was less need to invite public comment on the deepfake issue and that the Committee had developed a useful provision it could deploy quickly if a problem were to arise. One Committee member commented that he liked the burden-shifting aspect of proposed Rule 901(c) and would like to see it published for comment. Another Committee member opined that the Reporter had offered a helpful procedural framework but that he did not think publication was necessary. He advocated for holding the rule in abeyance until a problem arises that necessitates rulemaking.

Another Committee member agreed that holding the rule in abeyance made sense but asked why the draft proposal requires the opponent to demonstrate to the court "that a jury reasonably could find" an item of evidence fabricated. The Committee member suggested that the language seemed needlessly clunky. The Reporter explained that the Rule 104(b) standard is evidence "sufficient to support a finding" and that this might be a reasonable alternative. Ms. Shapiro also noted that the burden-shifting approach of the proposed rule would require extrinsic evidence and likely expertise. She suggested that a notice requirement would be necessary to avoid disrupting trials with such objections. The Reporter asked whether the notice would come from opponents of evidence who are advancing deepfake challenges. Ms. Shapiro responded in the affirmative, explaining that it should be pretrial notice of the intent to make a deepfake allegation. She argued that exhibits would be exchanged by a certain date, facilitating such notice. The Reporter promised to work on an appropriate notice provision to hold in abeyance with the draft rule.

Ms. Shapiro further asked if Rule 901(c) would require the proponent's intent to fabricate evidence. She noted that evidence in a child pornography case could consist of materials in a defendant's possession that had been generated or created by AI. If the government offered that evidence, it would be "generated" or "created" by AI but not fabricated within the meaning of the rule. The Reporter promised to think through those issues as well. He noted that publishing both Rules 707 and 901(c) would generate a veritable tsunami of public comment and that it would

make sense for the Committee to hold off on publication of Rule 901(c) to consider these issues and to better evaluate the comment generated by Rule 707. Another Committee member asked the Reporter to consider referencing the Rule 901(a) standard in a Committee note, suggesting that the burden-shifting mechanism of Rule 901(c) would not necessarily apply when a witness will confirm events related by evidence claimed to be a deepfake.

The Chair then asked whether Committee members wanted to publish proposed Rule 901(c) alongside proposed Rule 707. He noted that the likely flood of public comment might militate against publication of both but that the economies of scale achieved by publishing both rules together could be beneficial. The Chair then noted that the Committee consensus was to hold off on publishing Rule 901(c). The Chair then asked the Reporter to work on a notice provision akin to those in Rules 404(b) and 807 for the bullpen Rule 901(c) proposal. A Committee member stated that a notice provision could prove constitutionally problematic if it required a criminal defendant to show his hand with respect to impeachment of deepfake evidence before trial. Ms. Shapiro suggested that a notice requirement could be excused for “good cause.” The Committee agreed to keep proposed Rule 901(c) on the agenda for the Fall 2025 meeting.

VIII. Closing Matters

The Chair thanked the Committee and all participants for a productive session. He announced that the Fall 2025 meeting would be held on either November 6th or 7th and that Committee members would be notified of the date as soon as it could be finalized. The Chair reported that the Committee could consider inviting experienced federal and state practitioners for a symposium at the Fall meeting to share insights about evidentiary provisions that are problematic or could be helpful. He solicited thoughts and ideas from Committee members for such a panel, as well as other ideas or interests. The meeting was then adjourned.

Respectfully submitted,
Liesa L. Richter

MINUTES

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 10, 2025

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in Washington, D.C., on June 10, 2025. All members were present:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Shapiro, Esq.¹
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge Joan N. Ericksen
Judge Stephen Higginson

Justice Edward M. Mansfield
Dean Troy A. McKenzie
Judge Patricia A. Millett
Andrew J. Pincus, Esq.
Judge D. Brooks Smith
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipp

The following individuals also attended to support the work of the Standing Committee: Professor Catherine T. Struve, Reporter for the Standing Committee; Carolyn A. Dubay, Secretary to the Standing Committee and Chief Counsel, Rules Committee Staff; Kyle Brinker, Law Clerk to the Standing Committee; and Professor Bryan A. Garner and Professor Joseph Kimble, Style Consultants to the Standing Committee. Professor Daniel R. Coquillette, Consultant to the Standing Committee, attended remotely.

The following individuals attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules:

Judge Allison H. Eid, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules:

Judge Rebecca B. Connelly, Chair
(attended remotely)
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules:

Judge Robin L. Rosenberg, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant
(attended remotely)

Advisory Committee on Criminal Rules:

Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules:

Judge Jesse M. Furman, Chair
Professor Daniel J. Capra, Reporter

¹Ms. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Todd Blanche.

Other attendees at the meeting included: S. Scott Myers, Esq. and Bridget M. Healy, Esq., Rules Committee Staff Counsel; Shelly Cox and Rakita Johnson, Rules Committee Staff; Laurie Spolidoro, Deputy General Counsel, Administrative Office of the U.S. Courts; John S. Cooke, Director, Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC. Guests who attended remotely included: Chief Judge Michael A. Chagares, on behalf of the Executive Committee of the Judicial Conference; and Judge Sarah Vance, as incoming Chair of the Advisory Committee on Civil Rules.

1. OPENING BUSINESS

A. Welcome and Opening Remarks

Judge John D. Bates, Chair of the Standing Committee, called the meeting to order and welcomed the members and participants, including those attending remotely. Judge Bates also recognized members nearing the end of their terms on the Standing Committee, including Judge Jennifer Zipp, Judge Patricia Millett, and Mr. Kosta Stojilkovic.

Judge Bates acknowledged that it was his final meeting as the Chair of the Standing Committee² and noted that Judge James Dever, Chair of the Criminal Rules Committee, will serve as the next Chair of the Standing Committee while Judge Michael Mosman will succeed Judge Dever to serve as the next Chair of the Criminal Rules Committee. Judge Bates also informed the members that Judge Sarah Vance will replace Judge Robin Rosenberg as Chair of the Advisory Committee on Civil Rules. Judge Rosenberg will become the new Director of the FJC, replacing John Cooke. Judge Bates congratulated Judge Rosenberg on her selection as FJC Director and thanked her for her service to the Advisory Committee. Judge Bates also thanked John Cooke for his extraordinary service to the FJC.

Judge Bates informed the members about recent changes in the Rules Committee Staff. Ms. Carolyn Dubay is the new Chief Counsel for the Rules Committee Staff and Secretary to the Standing Committee. In addition, Scott Myers, staff attorney with the Rules Committee Staff, will retire at the end of June. Judge Bates thanked Mr. Myers and wished him the best in all his future endeavors after commending his bankruptcy rules expertise and noting that Mr. Myers had been a wonderful member of the staff for many years.

Judge Bates also welcomed members of the public and press, who observed the meeting in-person and remotely.

B. Discussion and Approval of the Meeting Minutes

After an opportunity for discussion and hearing no comments, upon motion and a second, with no opposition, the Standing Committee approved the minutes of the January 7, 2025, meeting.

²A summary of remarks offered in tribute to Judge Bates on the occasion of his last meeting as Chair of the Standing Committee is provided in Part 5 of these minutes.

C. Comments on the 2025 Strategic Plan for the Judiciary

Chief Judge Michael Chagares, on behalf of the Executive Committee of the Judicial Conference and in his capacity as Judiciary Planning Coordinator, provided an update on the draft 2025 Strategic Plan for the Judiciary. Chief Judge Chagares noted that the draft 2025 Strategic Plan was sent to all chief judges and all committee chairs for feedback and asked Committee members to submit any feedback by the end of June. Judge Bates requested that Committee members submit their comments to him for coordination of feedback. The draft 2025 Strategic Plan is expected to be submitted to the Judicial Conference for consideration at its September 2025 session.

2. ACTION ITEMS – REPORTS OF THE ADVISORY COMMITTEES

The Standing Committee next heard reports on action items from each of the five Advisory Committees.³ A summary of changes made by the Standing Committee to proposed amendments presented for final approval are set forth in the Appendix to these minutes.

A. Advisory Committee on Evidence Rules – Judge Jesse M. Furman, Chair

Judge Furman presented three action items on behalf of the Advisory Committee on Evidence Rules, which last met on May 2, 2025, in Washington, D.C. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 55.

1. *Amendments for Final Approval*

a. Amendments to Rule 801(d)(1)(A)

Judge Furman presented the Advisory Committee's request for the Standing Committee to recommend to the Judicial Conference final approval of amendments to Rule 801(d)(1)(A) regarding the hearsay exclusion for prior inconsistent statements of testifying witnesses. The text of the proposed amendment appears on page 64 of the agenda book and the written report begins on page 56. Judge Furman noted the current rule limits admissibility of prior inconsistent statements to those that were given under oath and subject to cross-examination. The amendment eliminates that limitation and provides that all prior inconsistent statements of a testifying witness are admissible over a hearsay objection, regardless of whether the prior statement was given under oath and subject to cross-examination.

Judge Furman reported that during the public comment period, which ran from August 15, 2024, to February 17, 2025, the Advisory Committee received eight comments, which were overwhelmingly positive and included support from the Federal Magistrate Judges Association, the American College of Trial Lawyers, and the National Association of Criminal Defense Lawyers. The comments echoed the reasons put forward by the Advisory Committee for the amendment. Namely, the amendment would eliminate the need for a confusing jury instruction on whether and when prior inconsistent statements can be considered for their truth as opposed to impeachment only. The amendment would also align the rule with Rule 801(d)(1)(B)'s treatment of prior consistent statements. The amendment would further address a perceived imbalance in the rules that favor the government in criminal cases, as most witnesses testify for the prosecution,

³ Information items presented by the Advisory Committees are set forth in Part 3 of these minutes.

and thus the government is able to secure prior statements under oath by having those witnesses testify before the grand jury. Judge Furman also noted that the Advisory Committee recommended final approval of the amendment to Rule 801(d)(1)(A) by a vote of 8-1.

Judge Furman also informed the Standing Committee of edits made to the committee note after the public comment period. First, the note was updated to observe that the amendment would remove the need for a confusing jury instruction attempting to distinguish between substantive and impeachment uses for prior inconsistent statements. The committee note also points out that the amended rule treats consistent and inconsistent statements similarly. Second, the updated committee note stresses that the rule governs admissibility rather than sufficiency. These changes were already reflected in the committee note set out in the agenda book. Judge Furman noted one additional change not set out in the agenda book: in the committee note, the word “exception” found on page 65, line 32 of the agenda book, should read “objection.”

The members then discussed the proposed amendment.

A judge member observed that Rule 613(a) requires a party, on request, to show or disclose the contents of a prior statement to an adverse party’s attorney when examining a witness about the prior statement. With the proposed amendment to Rule 801(d)(1)(A) allowing prior statements to be considered for their truth, the judge member asked whether Rule 613(a) should also be changed to require disclosure without a request from the adverse party. Professor Capra explained that Rule 613(a) is inapplicable in those circumstances and Rule 613(b) would apply. Specifically, Rule 613(a) speaks to cross-examination with a prior inconsistent statement, while Rule 613(b) speaks to admitting a prior inconsistent statement. Since the prior statements are offered not for cross-examination but for proof of a fact, a party must introduce evidence of the statement and Rule 613(b) controls.

Judge Bates further asked whether there was substance to a commenter’s concern that a “deepfake” (digitally fabricated or altered evidence) might be proffered to try to show a prior inconsistent statement. Professor Capra acknowledged that deepfakes may be a problem in general for any rule of admissibility, but that issue would be addressed with potential rule development regarding deepfakes rather than a rule about prior inconsistent statements. Judge Bates also raised a question about language in the committee note on page 66, line 52 of the agenda book, which provided in part that if statements “are admissible for purposes of proving the witness’s credibility, they are admissible as substantive proof.” He proposed changing “proving” to “assessing.” Judge Furman and Professor Capra agreed to this edit.

Following this discussion, upon a motion and a second, with no opposition, the Standing Committee unanimously approved recommending to the Judicial Conference final approval of the amendment to Rule 801(d)(1)(A), with the minor revisions discussed above and indicated in the Appendix.

2. *Preliminary Drafts for Publication for Public Comment*

Judge Furman next presented the Advisory Committee's request that the Standing Committee approve publication for public comment on proposed amendments to Rule 609 and proposed new Rule 707.

a. Preliminary Draft of Amendments to Rule 609

Judge Furman first presented the Advisory Committee's request for the Standing Committee to approve publication for public comment on proposed amendments to Rule 609, which relates to use of prior criminal convictions for impeachment purposes. The text of the proposed amendments begins on page 71 of the agenda book and the written report begins on page 57.

The proposed amendment to Rule 609(a)(1)(B) addresses the standard under which evidence of prior convictions not based on falsity may be introduced to attack a testifying criminal defendant's character for truthfulness. Judge Furman provided background for the Advisory Committee's request, and noted that in 2023, the Advisory Committee received a proposal to abrogate Rule 609 entirely. The Advisory Committee ultimately decided to proceed with a more modest proposed amendment to the rule text, as well as a shortened committee note. Judge Furman explained that the proposed amendment addresses the concern that district courts were not heeding Congress's intent that the default rule weigh *against* admissibility of prior convictions. Specifically, the proposed amendment adds "substantially" before the word "outweighs" in Rule 609(a)(1)(B).

Judge Furman recounted developments since the Advisory Committee's discussion of the proposed amendments at its fall 2024 meeting. First, additional recent cases indicated that some courts were continuing to admit such evidence, effectively applying a default rule in favor of admissibility of prior convictions. Second, the Department of Justice's original objections and concerns about language in the committee note had been addressed, and DOJ now supports the proposed amendment to Rule 609(a)(1)(B). Third, Judge Furman noted that the New York Council of Defense Lawyers submitted a letter supporting the proposed amendment.

Judge Furman next described the proposed amendment to Rule 609(b), which provides for an exclusionary balancing test for admissibility of convictions where more than 10 years have passed since the later of conviction or release from confinement. The current rule specifies when the 10-year period begins but does not specify when the time-period ends. The proposed amendment addresses a circuit split over when the period ends, and as Judge Furman explained, courts have used several different end dates, including the date of the alleged offense, the date of indictment, the date of trial, and the date of the witness's testimony. The Advisory Committee decided that the date of trial is the best available option because it is the date least subject to manipulation by the parties. The proposed amendment clarifies that the 10-year time-period for the rule's applicability is measured from the date of conviction or end of confinement, whichever is later, until the "date of trial."

Judge Furman noted that the Advisory Committee voted 8-1 to recommend the proposed amendments to Rule 609(a)(1)(B) and 609(b) for publication for public comment.

The members then discussed the proposed amendments.

Regarding Rule 609(a)(1)(B), a judge member asked if adding “substantially” in Rule 609(a) would effectively import the caselaw interpreting “substantially outweigh” in Rule 609(b)(1), which generally does not permit evidence of a prior conviction. Professor Capra responded that this change likely would import that standard; however, he said, a study of cases applying Rule 609(b) indicated that it does not result in automatic exclusion of the convictions to which it applies.

Another judge member asked if the fourth paragraph of the draft committee note, found on page 74 of the agenda book, properly describes as “problematic” the practice of some courts to admit only the fact of a felony conviction to impeach a defendant. Judge Furman responded that the Advisory Committee viewed this practice as problematic; it leaves the jury to guess as to what the felony conviction was. Professor Capra said that the original note was more detailed, and the current draft note reflects a compromise with the DOJ. As to this issue, a practitioner member asked how the paragraph relates to the amendment and thought that describing the practice as “problematic” was gratuitous. Professor Capra said that the paragraph explains that such practice by courts is inappropriate because Rule 609(a)(1)(B)’s balancing test requires weighing the probative value and prejudicial effect of evidence of a particular criminal conviction, not of a generic “felony conviction.” The language in the note, he reiterated, is a result of compromise. The judge member said it could be helpful for the committee note to cite an appellate decision that provides guidance about the permissible scope of cross-examination concerning the facts underlying a conviction. Professor Capra commented that the second paragraph of the committee note, starting on page 73, line 54 of the agenda book, addresses this concern. That paragraph observes that the permissible specifics concerning a conviction are governed by Rule 609. Professor Capra explained that, under the caselaw, the jury may know only that the defendant was convicted, what the conviction was for, and the date of the conviction.

Another judge member expressed concern that if the fourth paragraph of the committee note describes the only-the-fact-of-a-felony-conviction compromise as “problematic,” that might lead judges to think that the note was saying it was inappropriate to adopt such a compromise even in instances when the defendant affirmatively agrees to the only-the-fact-of-a-felony-conviction approach. Another judge member agreed; she suggested that the issue is a nuanced one where the interests of the defendant will play out differently depending on the circumstances. She argued that the comment should not say flatly that this type of compromise is always bad. Sometimes the defendant wants the jury to know the name of the conviction, but there are times when the name of the conviction is misleading.

A practitioner member suggested changing the sentence on page 74, line 75 of the agenda book, to begin: “Absent agreement by the parties, that solution is problematic....” Professor Capra and Judge Furman agreed. With that change, Judge Furman suggested, the paragraph could be retained in the committee note as published for public comment, and the Advisory Committee would reconsider the committee note with the benefit of comments by the Standing Committee and the public. A judge member asked whether the initial phrase should refer to “agreement by the defendant” rather than “agreement by the parties”; but Judge Furman and Professor Capra preferred “agreement by the parties.” Judge Furman accepted a style suggestion to remove the comma after “problematic.” In the same sentence of the committee note (page 74, line 79), Judge Bates suggested changing “character of truthfulness” to “character for truthfulness,” and this change was agreed to. A judge member proposed changing “is problematic” to “may be problematic.” Judge Furman responded that the Advisory Committee’s view is that the practice is

problematic, and Professor Capra argued for retaining “is problematic,” especially in light of the addition of “Absent agreement by the parties.” The practitioner member who had initially questioned the use of the term “problematic” reiterated that the term does not provide actual guidance. Professor Capra reiterated that the language was a compromise with the DOJ. Judge Bates suggested keeping the language “is problematic” for the public comment period to receive feedback.

As to the third paragraph of the committee note, Judge Bates asked if the example starting on page 74, line 63 of the agenda book discusses the application of Rule 403, not Rule 609. If so, Judge Bates asked whether a discussion of how Rule 403 is applied belongs in the committee note to Rule 609. Professor Capra and Judge Furman both stated that they thought the example was helpful but that they would not have strong objections to removing it from the committee note.

Judge Bates raised two additional points. In the last paragraph of the committee note (page 74, line 82), Judge Bates suggested removing “original” or replacing it with “current” because it is not referring to the rule as first promulgated. Several members and consultants then suggested “existing,” “prior,” and “earlier.” Judge Bates, Judge Furman, and Professor Capra agreed to use “existing.” Second, Judge Bates observed that the committee note’s second paragraph (agenda book page 73, lines 56-57) uses the terms “bad acts” and “specific acts,” though these terms do not appear in the Evidence Rules. Rather, the rules use the term “instances of conduct.” Professor Capra said that “bad acts” is a very common reference and suggested retaining the term. A judge member proposed using “conduct underlying the conviction.” Judge Furman supported using “specific instances of conduct,” which is found in Rule 608(b). Professor Capra thought that “conduct” does not distinguish the act from the conviction itself. Judge Bates responded that Rule 608(b) uses the term “conduct.” Professor Capra accepted the change to “specific instances of conduct.”

Regarding the proposed amendment to Rule 609(b), a judge member asked whether the phrase “the date of trial” (agenda book page 72, line 28) was sufficiently clear. Did it mean the first day of trial? The date jury selection begins? The member asked whether the language should be more specific, such as referring to the date the jury is convened. Judge Furman and Professor Capra offered that any difference in interpretation would likely be a matter of days and ultimately not a material difference. Judge Furman noted that the rule cannot be tethered to a date concerning the jury because the rule would apply in a non-jury trial as well. He said that he was not averse to a different term, but he thought date of trial is clear. Professor Capra asked if the “date that trial is set” is more specific than “date of trial.” Another judge member said that there can be a big difference between the date that a trial is initially scheduled and the date that the jury for that trial is impaneled. Professor Capra stressed that the rule was merely being approved for publication for public comment. Judge Bates suggested using “the date that trial commences” as an end date that is more specific and addresses some of the concerns raised. Judge Furman said he is fine with “the date that trial commences” but thought “commences” still introduces ambiguity. Judge Furman and Professor Capra reiterated that the specific end date is likely immaterial because the difference between them would most likely be in terms of days or weeks. Professor Capra said that the goal was certainty and “the date that trial commences” would be fine. Professor Garner noted that “commence” is routinely changed to “begin” throughout the rules. Professor Capra and Judge Bates supported using “begins.”

Judge Furman summarized the Standing Committee’s revisions to the proposed amendment. In proposed Rule 609(b) “the date of trial” was changed to “the date trial begins,” and a conforming change was made to the last sentence of the committee note. In the second paragraph of the committee note, “bad acts” was changed to “specific instances of conduct.” The third sentence of the fourth paragraph was changed to read: “Absent agreement by the parties, that solution is problematic because....” Also in the fourth paragraph, “character of truthfulness” was changed to “character for truthfulness.” In the fifth paragraph, “original rule” was changed to “existing rule.”

Following this discussion, upon motion and a second, with no opposition, the Standing Committee approved publication for public comment on the proposed amendments to Rule 609(a) and Rule 609(b), with the revisions discussed above.

b. Preliminary Draft of New Rule 707

Judge Furman next reported on the Advisory Committee’s efforts to address two concerns with the increased use of artificial intelligence and machine-generated evidence: (1) authenticity concerns with possible deepfakes,⁴ and (2) reliability concerns when machine learning output is offered as evidence. Proposed new Rule 707 addresses the latter concern and sets standards for admissibility of machine-generated evidence offered without an expert witness. The text of proposed Rule 707 begins on page 75 of the agenda book and the written report begins on page 58.

Judge Furman explained that the Advisory Committee viewed the reliability issues attendant to machine-generated output as akin to reliability issues attendant to expert testimony under Rule 702, which applies in situations when a testifying expert uses machine-learning to reach a conclusion. There are circumstances, however, when machine-generated output may be introduced without a testifying expert. As examples, Judge Furman explained how machine-generated output can be used without an expert to find patterns in vast amounts of stock trading data, to assess the complexity of software programs to determine the likelihood that code was misappropriated, or to determine whether two works are substantially similar. In these examples, the machine output could be offered without the use of expert testimony subject to Rule 702, such as through a lay witness or directly with a certification of authenticity under Rule 902(13). Judge Furman noted that the Advisory Committee felt that a new rule to address this situation was preferable to amending Rule 702. Rule 702 was recently amended in 2023, and the Advisory Committee tries to avoid multiple amendments to a single rule over a short time period. Also, Rule 702 is a rule of general applicability, so a separate subdivision dealing with machine-generated evidence would be difficult to draft because of its highly specific application. Therefore, the Advisory Committee recommended a new rule to address machine-generated output that requires the same showing of reliability required for a testifying expert under Rule 702(a)-(d).

Judge Furman noted that the Advisory Committee included an exception to the required showing under new Rule 707 when the output is produced by basic scientific instruments. This exception

⁴ The Advisory Committee’s efforts to address deepfakes are described in the information items set forth in Section 3 of these minutes.

is designed to avoid litigation over the output of instruments that can be presumed reliable. Given the wide range of potential instruments and technological change, however, the Advisory Committee felt it was better to leave it to judges to determine whether a particular instrument falls within the exception set forth in proposed Rule 707. Judge Furman noted that a prior draft of new Rule 707 included an exception for routinely relied upon commercial software, but the Advisory Committee removed that language because they felt it would create too broad an exception. Judge Furman noted that the Advisory Committee is aware that this topic raises some related issues concerning disclosure requirements (for example, of the source codes that underly machine-generated output), but feels that such disclosure issues are better addressed by the Advisory Committees for the Civil and Criminal Rules.

Judge Furman noted that the Advisory Committee voted 8-1 to recommend proposed new Rule 707 for publication for public comment. The DOJ was the sole dissenting vote. Judge Furman observed that sometimes when the Advisory Committee forwards a proposed rule for publication, it does so on the assumption that the proposal will be on track for future approval. This was not the case here and the Advisory Committee is agnostic as to whether the rule should ultimately gain final approval. But, as this is an area of significant concern and complexity, the Advisory Committee felt it is important to learn from public comment. Professor Capra added that the Advisory Committee has previously held two panels with experts regarding artificial intelligence and its possible impact on the Evidence Rules, and the public comment period will be valuable.

The members then discussed proposed new Rule 707.

Judge Bates commended the Advisory Committee for starting the effort to address this sensitive but important subject. He asked whether the draft rule should affirmatively state that it applies when machine-generated evidence would be subject to Rule 702 if testified to by an “expert” witness, not just any witness. Judge Furman responded that the Advisory Committee initially had the same thought but realized that specifying “expert” would be tautological because Rule 702 applies only to expert testimony.

As to the draft rule’s requirement that machine-generated evidence must “satisf[y] the requirements of Rule 702 (a)-(d),” Judge Bates asked whether the specific reference to subdivisions (a)-(d) was necessary. Professor Capra noted that Rule 702 has introductory language dealing with qualifications that the Advisory Committee did not think appropriate to incorporate into new Rule 707. A practitioner member asked how Rule 702(a) would apply to machine-generated evidence alone because Rule 702(a) scrutinizes how an expert’s scientific, technical, or other specialized knowledge will help the trier of fact. Judge Furman explained that to the extent that Rule 702(a)-(d)’s requirements are an awkward fit for a machine rather than a person, the Advisory Committee thought the advantage of the courts’ familiarity with the standards in Rule 702 outweighed the disadvantages of importing the requirements wholesale. Professor Capra added that public comment might elucidate the instances in which machine-generated evidence would cover obvious points that the jury would already know about on its own.

A judge member observed that while the proposed rule text made an exception for “basic scientific instruments” (agenda book page 72, lines 6-7), the committee note (page 77, line 68) used the term “simple scientific instruments.” This member suggested that “simple” captured the idea better than “basic.” She asked whether it would be helpful to refer to instruments that were traditionally or

historically employed. Professor Capra and Judge Bates discussed whether the language “simple” is an improvement over “basic” and whether judges would have difficulty determining what fits in that category. Professor Capra agreed to update the draft rule text to refer to “simple” rather than “basic,” noting that the language may still change based on public comment.

A judge member expressed enthusiasm about this rulemaking effort and had two comments. First, the committee note (page 77, lines 71-73) states that the rule does not apply when the court can take judicial notice that the machine output is reliable. The member asked if the Advisory Committee would consider deleting that sentence because it may encourage parties to attempt to avoid Rule 702 by asking the court to take judicial notice under Rule 201. Professor Capra said that judges currently take judicial notice of certain artificial intelligence outputs like Google Maps, and he explained that the Advisory Committee had added this passage to the committee note in response to input from a judge on the committee who questioned whether a Rule 707 hearing should be held for something when judicial notice has already been taken of its reliability. Second, the last paragraph of the draft committee note referred to “the notice principles applicable to expert opinion testimony.” The member suggested that the language be changed to “the notice principles applicable to expert opinion testimony and reports of examinations and tests...” because machine-generated output is more similar to expert examinations and tests than expert opinion testimony. He said that this would expand the reference to encompass other salutary discovery provisions like a continuing duty to disclose and a district court’s regulatory authority. Professor Capra and Judge Furman agreed that the proposed addition could be useful.

Judge Bates cautioned that while the committee note referred to “the notice principles applicable to expert opinion testimony,” it was not clear what was intended by “the notice principles.” Did this include the notice principles under Civil Rule 26 that include written reports as well as the principles in Criminal Rule 16? Professor Capra said that the Advisory Committee intended the language to be general because adding detailed notice provisions might hinder the efforts of the Civil and Criminal Rules Committees in this area. Ms. Shapiro observed that the DOJ had raised the issue of notice because, if machine-generated evidence is used at trial, the adverse party will need advance notice to prepare to rebut the evidence. More generally, she said that the DOJ’s main concerns were that machine-generated evidence is a broad category – far broader than the advisory committee’s actual target in this rule, which she took to be focused on addressing expert-opinion-like results produced using generative artificial intelligence. Ms. Shapiro also thought that the Advisory Committee will need to explore the relationship between Rule 902(13) (“Evidence That Is Self-Authenticating; Certified Records Generated by an Electronic Process or System”) and this rule. Professor Capra responded that when a judge decides a question of admissibility under Rule 702, the judge applies Rule 104(a) – under which the judge must be persuaded by a preponderance of the evidence that the rule’s requirements are met. By contrast, when a party seeks to authenticate evidence under Rules 901(b)(9) or 902(13), the proponent need only make a prima facie showing — enough evidence that a reasonable juror could find the item authentic. Meeting the prima facie test that applies under Rules 901(b)(9) and 902(13) would not suffice under proposed Rule 707.

A practitioner member, responding to Judge Bates, said that it would be difficult for the committee note to be very specific about the notice principles because it depends on the case. He pointed out that the committee note used the word “applicable” (“the notice principles applicable to expert opinion testimony”), and that this directed the reader to consider what kind of case it was and, thus, what rules would apply to such a case. Professor Capra agreed.

A judge member suggested making the notice principles clearer by referencing a particular rule that would be applicable for certain cases. For example, the note could say, “Rule X in civil cases and Rule Y in criminal cases.” Professor Capra cautioned against using specific rule numbers because the rules can change. Professor Beale said that the note would have to list several criminal rules, and she advised against it. Professor King agreed that the committee note probably should not cite particular rules but suggested the note could say that “the rules governing discovery and disclosure applicable to expert testimony and reports of examinations and tests should be applied.”

Judge Bates observed that the discussion indicated that the notice issue could be a real issue, and that it is difficult to determine what the committee note should say. Professor Capra suggested adding “and reports of examinations and tests” as previously mentioned and ending it there. A practitioner member suggested adding “that would be,” thus: “the notice principles that would be applicable” Professor Capra agreed and also suggested that if the committee wished to make the reference more general, it could refer to “the notice principles applicable under other rules.” Judge Furman disagreed with the suggestion to add “under other rules” because there could be a notice principle from caselaw and not tethered to a specific rule that the Advisory Committee would think appropriate to be applied. He also acknowledged that the Advisory Committee views notice as an issue to discuss further, and the Advisory Committee may want to address the issue more with the benefit of public comments.

During this discussion, Judge Furman identified a typographical error in the rule text on page 75, line 5 of the agenda book (“it” and “if” were transposed). Professor Capra summarized the modifications agreed to thus far. In the rule text, “it if” was changed to “if it” and “basic scientific instruments” was changed to “simple scientific instruments.” And the last paragraph of the committee note was modified to read in full: “Because Rule 707 applies the requirements of admitting expert testimony under Rule 702 to machine-generated output, the notice principles that would be applicable to expert opinion testimony and reports of examinations and tests should be applied to output offered under this rule.”

Judge Bates asked three questions. First, on page 76, line 45, should the committee note say “self-authenticated” rather than simply “authenticated,” given that Rule 902(13) concerns self-authentication? Professor Capra said that a party must still file a certificate for evidence to be self-authenticated, so saying “self-authenticated” would be confusing, but he could accept it. Second, on page 76, line 49, could the reference to “The rule” be confusing given that the preceding paragraph discussed Rule 902(13)? Judge Furman said that he would defer to the style consultants. Professor Capra said that the style consultants do not provide guidance for committee notes. He suggested “This rule,” and Judge Bates agreed. Third, Judge Bates suggested that the reference on line 51 to “machine evidence” should be changed to “machine-generated evidence” (the term used elsewhere in the note). Professor Capra agreed.

Judge Furman summarized the modifications to the proposal. In the rule text, “it if” became “if it” and “basic scientific instruments” became “simple scientific instruments.” In the committee note, at line 45, “authenticated” became “self-authenticated”; at line 49, “The rule” became “This rule”; at line 52, “machine” became “machine-generated”; and at lines 80-82, the end of the last sentence of the note was revised to read “the notice principles that would be applicable to expert opinion testimony and reports of examinations and tests should be applied to output offered under this rule.”

Following the discussion, upon motion and a second, and over one objection (by the Department of Justice), the Standing Committee approved publication for public comment on proposed new Rule 707, with the minor revisions discussed above.

B. Advisory Committee on Appellate Rules – Judge Allison H. Eid, Chair

Judge Eid presented the action items on behalf of the Advisory Committee on Appellate Rules, which last met on April 2, 2025, in Atlanta, Georgia. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 101.

1. *Amendments for Final Approval*

Judge Eid reported on the Advisory Committee's request for the Standing Committee to recommend for final approval by the Judicial Conference amendments to Rule 29, along with conforming amendments to Rule 32 and the Appendix of Length Limits, and amendments to Form 4. The text of the proposed amendments begins on page 112 of the agenda book and the written report begins on page 102.

a. Amendments to Rule 29, Rule 32, and the Appendix of Length Limits

Judge Eid first presented the Advisory Committee's request for the Standing Committee to recommend final approval by the Judicial Conference of amendments to Rule 29 and conforming amendments to Rule 32 and the Appendix of Length Limits.

Judge Eid began by explaining changes made to the proposed amendments to Rule 29 after publication for public comment. The Advisory Committee received hundreds of comments and held a hearing on the proposed amendments. One item of particular concern during public feedback was a proposed change to Rule 29 made late in the drafting process to eliminate the option to file an amicus brief at the initial hearing stage on consent of the parties. This proposed change to Rule 29 was intended to address concerns about recusal issues caused by amicus filings, and would have required all nongovernmental amici to file a motion seeking the court's permission to file their briefs. Public comment was specifically invited on this point, and the public comments uniformly opposed elimination of the consent option. Commenters stated that the current culture of consent works well, that a motion requirement might change that culture by inviting parties to oppose motions, and that a motion requirement would increase work for lawyers and judges. Moreover, commenters asserted that imposing a motion requirement was not a particularly good solution to the recusal problem. Judge Eid reported that the Advisory Committee found the commenters' arguments persuasive, and ultimately the Advisory Committee unanimously agreed to abandon the proposal to amend Rule 29 to eliminate the consent option for nongovernmental amici.

Judge Eid reported that the public comments also expressed concerns about proposed Rule 29(a)(2)'s statement of the purpose of an amicus brief (which disfavored redundancy in amicus briefs). Public comments indicated that the proposed language was too restrictive and that avoiding redundancy in briefs would pose serious practical problems. This concern is tied to the concern about the proposed motion requirement, with commenters fearing that parties would oppose an amicus filing by asserting that it was redundant. In addition to dropping the proposal to eliminate the party-consent option, the Advisory Committee responded to commenters' concerns by revising

the statement of purpose to closely track that used by the Supreme Court and moved the redundancy language to the committee note.

Judge Eid next discussed the disclosure-related features of the proposal. As to these features, she reported, the public did not speak with one voice. There was considerable opposition to the proposed disclosure requirements, but also notable support. The most controversial provision was proposed Rule 29(b)(4), which in the preliminary draft published for public comment would have required an amicus to disclose whether “a party, its counsel, or any combination of parties, their counsel, or both has, during the 12 months before the brief was filed, contributed or pledged to contribute an amount equal to 25% or more of the total revenue of the amicus curiae for its prior fiscal year.” Opponents of this change argued it would interfere with associational rights and discourage amicus participation, while proponents thought it was an important step to identify parties with influence over the amicus. Judge Eid also noted disagreement over the appropriate threshold for disclosure, with some proponents of the disclosure suggesting a contribution or pledge threshold of 10% rather than 25%. The Advisory Committee ultimately voted 5-4 to remove proposed Rule 29(b)(4) from the set of amendments that it sent forward for final approval. Those who voted to remove proposed Rule 29(b)(4) pointed to the burden of compliance, lack of significant problems, considerable opposition, and the fact that other parts of the proposed rule change (such as proposed Rule 29(a)(4)(E)-(F)) address the problem of entities being created for the sole purpose of an amicus filing. The committee members who voted against removing proposed Rule 29(b)(4) were not swayed by arguments against disclosure by people who would have to make disclosures; those members emphasized that the point of getting this information is to benefit the public and the judges and to support public trust in the judicial system.

Judge Eid reported that the other proposed disclosure requirement that received considerable attention during the comment period was proposed Rule 29(e), dealing with earmarked contributions by nonparties. Much of the critical public comment, however, did not reflect awareness that existing Rule 29(a)(4)(E)(iii) currently requires the disclosure of earmarked contributions by nonparties. Perhaps that is because the current provision is buried deep in an item under a subparagraph, or perhaps it is because it treats both earmarked contributions by a party and earmarked contributions by a nonparty in a single item even though the rest of Rule 29(a)(4)(E) deals only with parties and their counsel. Judge Eid pointed out that one virtue of the proposed amended Rule 29 is that it separates and therefore clarifies the disclosure obligations regarding parties and nonparties. Judge Eid also stated that proposed Rule 29(e) is not a major expansion of the disclosure requirements. In one respect, it reduces the current disclosure requirements for nonparties. Specifically, by setting a \$100.00 de minimis threshold, it eliminates the need to disclose modest earmarked contributions that currently must be disclosed. The proposed amendment does, however, expand the disclosure requirements in one respect. The current rule does not require the disclosure of earmarked contributions by members of the amicus, even if they joined the same day they made the contribution to avoid disclosure. The proposed amendment blocks this easy evasion. One commenter noted that requiring that a person be a member “for the prior 12 months” (as the published proposal did) ran the risk that a longtime member who had recently allowed his membership to lapse would lose the protection of the membership exception. To deal with this possibility, the Advisory Committee rephrased this provision to extend the

member protection to a member of the amicus who “first became a member at least 12 months earlier.”

The final text of proposed Rule 29(e) can be found on page 119 of the agenda book beginning at line 129. Judge Eid reported that one opponent of proposed Rule 29(b)(4) had noted that the change reflected in Rule 29(e) is a modest tweak to an existing rule that reduces the burden on crowd funding an amicus brief and does not allow evasion of an existing requirement.

Judge Eid noted that the Advisory Committee also wanted to avoid having the expanded disclosure requirements count against a party’s word limit. To achieve this, it changed proposed Rule 29(a)(4) to refer to the “disclosure statement,” thereby triggering Rule 32(f)’s exclusion of “disclosure statement[s]” from the word count.

Judge Eid observed that although the Advisory Committee had been closely divided regarding the removal of proposed Rule 29(b)(4), it voted unanimously to recommend for final approval the proposed Rule 29 amendments, as amended at its spring meeting, along with conforming amendments to Rule 32(g) and the Appendix of Length Limits. Accordingly, the Advisory Committee recommended that the Standing Committee give final approval to the proposed amendments to Rule 29, Rule 32(g), and the Appendix of Length Limits.

Professor Hartnett then noted a few clerical corrections and a style change to the committee note as set forth in the agenda materials. On page 123, line 234, “Rule 29(a)(4)(D)” was changed to “Rule 29(a)(4).” On page 124, line 238, “curiae” was deleted. “Rule 29(a)(4)(E)” was changed to “Rule 29(a)(4)(F)” on page 124, line 245 and on page 127, line 347. And references to Rule 29(a)(4)(D) on page 125, lines 292-93 and on page 127, line 350 were changed to refer to Rule 29(a)(4)(E).

The members then discussed the proposed amendments.

A judge member expressed concern about the proposed amendment to Rule 29(a)(7), which would replace the existing “Except by the court’s permission, an amicus curiae may not file a reply brief” with “An amicus may file a reply brief only with the court’s permission.” The member observed that the proposed amended language would parallel the language in existing Rule 29(a)(8) relating to oral arguments, and he observed that his court gets many requests by amici to participate in oral argument. The member worried that the proposed new phrasing for Rule 29(a)(7) would encourage even more requests by amici to file reply briefs, and he also worried that reply filings by amici would cause logistical problems for the briefing schedule (for instance, the opposing party would want to file a sur-reply to respond to the amicus’s reply). Professor Hartnett explained that he had deferred to the style consultants on this proposed change, on the ground that it was purely stylistic. Professor Garner observed that the two phrasings (“Except by permission, may not file” and “may file only with permission”) mean the same thing, but he agreed with the judge member that the negative phrasing (“Except by permission, may not file”) had more of an admonitory tone (“You may not do it unless”), which might do more to discourage requests. Professor Kimble objected, arguing that the choice was stylistic and that the style guidelines mandate converting double negatives to positives. Professor Beale offered that changing the provision would attract the attention of amici, though she conceded that it would alleviate her concerns if the committee note were to state that the change was purely stylistic. Professor Bartell suggested saying “An amicus

may not file a reply brief except with the court’s permission.” Professor Hartnett said that he and Judge Eid would be happy with that phrasing. Judge Bates observed that Rules 29(a)(7) and (8) have different language and are viewed differently and treated differently by the bar.

A practitioner member expressed concern with the expansion of the disclosure requirement to include earmarked contributions by new members of organizations, which could require disclosure of a legitimate associational activity, without a showing that the change addresses an existing problem. This member argued that if a person decides to join an organization concurrently with a contribution for an amicus brief by that organization, the explanation could be that they want to become a member of the organization because they see that the organization’s work is relevant to them. If the concern behind the disclosure requirement is that the amicus would just say anything the funder told it to say, this member was skeptical that the kinds of amici that judges would lend credence to would actually let a donor tell them what to say. Professor Hartnett responded that the existing disclosure requirement for certain earmarked contributions (in current Rule 29(a)(4)(E)(iii)) is designed to protect against situations where the funder’s donation allows it to influence what the amicus says in the brief. He explained that the proposed disclosure requirement for earmarked contributions by new members of an amicus helps make sure that the current disclosure rules cannot be evaded, while the exemption of newly-created amici from that disclosure requirement addresses the concern that new organizations would always have to disclose earmarked contributions by any of their members.

Another practitioner member explained how the proposal had evolved: There was some support at first for requiring disclosure of all earmarked contributions, even by longstanding members of the amicus. But the Advisory Committee gave weight to the concern that such a requirement would disparately impact different kinds of amici, because some amici have large general funds that can support amicus briefs, while smaller amici need to “pass the hat” (solicit donations from their members) any time they want to fund a brief. So the goal was to take a middle road. This member suggested that, in his experience, it is rare for a funder to become a member of the amicus at the eleventh hour unless that funder has a very focused interest in the case.

The members had no comments or suggestions regarding the proposed conforming amendments to Rule 32 and the Appendix of Length Limits.

Professor Hartnett reviewed the changes to Rule 29 – namely, that proposed Rule 29(a)(7) was revised to read “An amicus may not file a reply brief except with the court’s permission,” and that clerical corrections and a style change were made to the committee note as he had detailed earlier.

Following the discussion, upon motion and a second, with no opposition, the Standing Committee approved recommending to the Judicial Conference final approval of the amendments to Rule 29, along with the conforming amendments to Rule 32 and the Appendix of Length Limits, with the minor revisions to Rule 29 discussed above and indicated in the Appendix.

b. Amendments to Form 4

Judge Eid next presented the Advisory Committee’s request for the Standing Committee to recommend final approval by the Judicial Conference of amendments to Form 4 relating to affidavits accompanying motions to appeal *in forma pauperis*. The goal of the changes is to make

the form simpler and less intrusive. The text of the proposed amendment appears on page 180 of the agenda book, and the written report begins on page 107. Judge Eid reported that the public comments and testimony on the preliminary draft were generally positive, and the Advisory Committee thereafter adopted some suggestions to improve ease of use of the form. Judge Eid also noted that the Advisory Committee unanimously recommended the amendments to Form 4 for final approval.

After an opportunity for discussion, and with no comments from the members, upon motion and a second, and with no opposition, the Standing Committee approved recommending to the Judicial Conference final approval of the amendments to Form 4.

2. Preliminary Drafts for Publication and Public Comment

a. Preliminary Draft of Proposed Amendments to Rule 15

Judge Eid next presented the Advisory Committee’s request for the Standing Committee to approve publication for public comment on proposed amendments to Rule 15 relating to appellate review or enforcement of an agency order. The text of the proposed amendment begins on page 186 of the agenda book, and the written report begins on page 108.

Judge Eid provided background to the proposed amendment and explained that it was intended to remove a potential trap for the unwary in Rule 15. The “incurably premature” doctrine holds that if a motion to reconsider an agency decision makes that decision unreviewable in the court of appeals, the petition for review is dismissed, and a new petition for review must be filed after the agency decides the motion to reconsider. Rule 4, dealing with appeals from district court judgments, used to work in a similar way regarding various post-judgment motions. But in 1993, Rule 4 was amended to provide that such a premature notice of appeal becomes effective when the post-judgment motion is decided. The proposal would make a similar fix to Rule 15 as was previously done for Rule 4. Judge Eid noted that a similar suggestion was considered about twenty-five years ago but was dropped due to strong opposition by judges on the Court of Appeals for the D.C. Circuit. The Advisory Committee has been informed that there is no large opposition from D.C. Circuit judges at this point, though that does not mean there might not be concerns with a particular aspect of the proposal. The proposed amendment to Rule 15 is like the existing Rule 4, but it reflects the party-specific nature of appellate review of administrative decisions, in contrast to the usually case-specific nature of civil appeals. As with civil appeals, the proposed amendment to Rule 15 would require a party that wants to challenge the result of agency reconsideration to file a new or amended petition. Judge Eid reported that the Advisory Committee unanimously recommended publishing the proposed amendment for public comment.

The members then discussed the proposed amendments.

A practitioner member suggested that there was tension between the second and third sentences in draft Rule 15(d): The second sentence says that the prematurely-filed petition for review springs to life when the agency disposes of the last reconsideration request, but the third sentence says that a party intending to challenge an agency’s disposition of the reconsideration request must file a new petition for review. Professor Hartnett said that this feature of the proposed rule is parallel to how Rule 4 works – that is, once the motion for reconsideration is decided, the premature notice

becomes effective to review the prior decision, but if the party seeks to also challenge the decision on reconsideration, the party must file a new petition. That is, the difference between the second and third sentences of proposed Rule 15(d) relates to the type of ruling being appealed. Another practitioner member also found the second and third sentences confusing. He suggested that the third sentence read “a party intending to challenge the disposition of the petition for rehearing, reopening, or reconsideration must file a new petition.” Professor Hartnett said that the Advisory Committee proposed similar language, but it was changed for style reasons. After further discussion, Professor Kimble suggested saying “If a party intends to challenge the disposition of the petition for rehearing, reopening, or reconsideration, the party must” Professor Hartnett and Judge Eid agreed, but “the petition” was changed to “a petition.”

Following this discussion, upon motion and a second, with no opposition, the Standing Committee approved publication for public comment on the proposed amendments to Rule 15, with the revisions discussed above.

C. Advisory Committee on Bankruptcy Rules – Judge Rebecca B. Connelly, Chair

Judge Connelly, who attended the meeting remotely, presented the action items on behalf of the Advisory Committee on Bankruptcy Rules, which last met on April 3, 2025, in Atlanta, Georgia. The Advisory Committee’s report and the draft minutes of its last meeting are included in the agenda book beginning at page 209.

1. *Amendments for Final Approval*

Judge Connelly first presented the Advisory Committee’s request for the Standing Committee to recommend final approval by the Judicial Conference of proposed new Rule 7043 and proposed amendments to Rules 3018, 9014, 9017, 1007(c), 5009, and 9006.

a. Amendments to Rule 3018

Judge Connelly presented the Advisory Committee’s request for the Standing Committee to recommend final approval by the Judicial Conference of amendments to Rule 3018, which relates to accepting or rejecting a Chapter 9 or Chapter 11 plan. The text of the proposed amendment appears on page 233 of the agenda book and the written report begins on page 211.

Judge Connelly explained that the proposed amendment would authorize a court in a Chapter 9 or 11 case to treat as an acceptance of a plan a stipulation or oral statement on the record. This change would recognize and encourage the process that occurs in most Chapter 11 cases, whereby the negotiations continue right up to the court date.

Judge Connelly also explained that based upon public comment, the Advisory Committee revised the proposal to clarify that the statement on the record would be by the creditor or equity security holder or its authorized agent or attorney. Nothing in the rule indicates that a creditor is compelled to vote, nor does the amendment address filing objections to confirmation or solicitation of voting; it simply provides an additional means for plan acceptance. Judge Connelly reported that there were no public comments in opposition to the amendment.

After an opportunity for discussion and no comments from the members, and upon motion and a second, and with no opposition, the Standing Committee approved recommending to the Judicial Conference final approval of the amendments to Rule 3018.

b. Amendments to Rules 9014 and 9017 and New Rule 7043

Judge Connelly presented the Advisory Committee's request for the Standing Committee to recommend final approval by the Judicial Conference of amendments to Rules 9014 and 9017 and a new Rule 7043, which pertain to the procedure for a bankruptcy judge to approve remote testimony in certain matters. The text of the proposed amendments appears on pages 242, 246, and 251 of the agenda book and the written report begins on page 211.

Judge Connelly explained that proposed new Rule 7043 would make Civil Rule 43, which governs taking remote testimony in civil trials, applicable in adversary proceedings (which are akin to a civil action in the district court). The amendments to Rules 9014 and 9017 would permit remote testimony in contested matters when there are appropriate safeguards and cause to allow it. Judge Connelly said that "cause" incorporates the concept of good cause. Judge Connelly also reported that in drafting these changes, the Advisory Committee consulted with the Committee on Court Administration and Case Management and the Bankruptcy Committee.

Judge Connelly noted that the public comment period produced few comments, and the comments received were generally supportive and helpful. Based on the comments, the proposed amendments to Rule 9014 were slightly revised to clarify that Rule 9014 is not limited to motions. Professor Bartell explained that "new" Rule 7043 is not in substance a new rule; current Rule 9017 already provides that Civil Rule 43 applies to adversary proceedings.

The members then discussed the proposed new rule and amendments.

With respect to the second sentence of the committee note to Rule 9014, Judge Bates asked whether it was accurate to state that Civil Rule 43 "is no longer generally applicable in a bankruptcy case." He noted that Civil Rule 43 would continue to be applicable in adversary proceedings, and aspects of Rule 43 would also apply in contested matters by virtue of the use of parallel language in Rule 9014. Judge Connelly agreed that much of Civil Rule 43 is adopted into Rule 9014. Professor Bartell explained the goal was to make the point that whereas current Rule 9017 includes Civil Rule 43 on its list of rules that "apply in a bankruptcy case," after the amendments, Civil Rule 43 would no longer be on that list. Rule 43 would be applicable only to adversary proceedings and there would be a different standard for contested matters. Judge Connelly suggested removing the phrase "That rule is no longer generally applicable in a bankruptcy case, and." Professor Gibson supported Judge Connelly's suggestion, and this language was deleted from Rule 9014's committee note.

Following the discussion, upon motion and a second, and with no opposition, the Standing Committee approved recommending to the Judicial Conference final approval of the amendments to Rules 9014 and 9017 and proposed new Rule 7043, with the minor revision to Rule 9014's committee note discussed above and indicated in the Appendix.

c. Amendments to Rules 1007(c), 5009, and 9006

Judge Connelly next presented the Advisory Committee's request for the Standing Committee to recommend final approval by the Judicial Conference of amendments to Rules 1007(c), 5009, and 9006. The proposed amendments address the problem faced by individual debtors who go through bankruptcy but whose cases are closed without a discharge because they either failed to take the required course on personal financial management or merely failed to file the needed documentation of their completion of the course. The text of the proposed amendments appears on pages 218, 238, and 243 of the agenda book and the written report begins on page 212.

Judge Connelly explained that the proposed amendments would eliminate Rule 1007(c)'s deadline for filing the certificate of course completion (though not the requirement that it be filed). In addition, the amendment to Rule 5009 would add another reminder notice (about the course-completion-certificate requirement) to improve compliance. Judge Connelly noted that the public comments after publication were generally supportive, and no comments opposed the amendments. Professor Gibson said that this project was spurred by Professor Bartell's research, which showed that a significant number of debtors do not receive a discharge only because they failed to take the course or file the appropriate paperwork.

After an opportunity for discussion and with no comments from the members, upon motion and a second, and with no opposition, the Standing Committee approved recommending to the Judicial Conference final approval of the amendments to Rules 1007, 5009, and 9006.

d. Amendments to Official Form 410S1

Judge Connelly next presented the Advisory Committee's request for the Standing Committee to recommend final approval by the Judicial Conference of amendments to Official Form 410S1. The purpose of the amendments is to reflect an amendment to Rule 3002.1(b) regarding payment changes in home equity lines of credit (HELOCs). The text of the proposed amendment appears on page 252 of the agenda book and the written report begins on page 213. Judge Connelly also noted that no comments were submitted regarding the proposed amendment during the public comment period.

The members then discussed the amendments.

A judge member asked whether HELOC payments would be included in the upper-right-hand box for "New total payment," or whether HELOC amounts would be reflected in Part 3 only. Professor Gibson explained that the "New total payment" section would not be used for the HELOC amount.

With no further discussion, upon motion and a second, and with no opposition, the Standing Committee approved recommending to the Judicial Conference final approval of the amendments to Official Form 410S1.

e. Amendments to Rule 2007.1(b)(3)(B)

Judge Connelly next presented the Advisory Committee's request for the Standing Committee to recommend final approval by the Judicial Conference of a technical amendment to Rule 2007.1(b)(3)(B) to correct a cross-reference. The text of the proposed amendment appears on page

221 of the agenda book and the written report begins on page 213. Judge Connelly explained that Rule 2007.1(b)(3)(B) refers to the previous subsection of the rule as “(A)(i) – (vi).” During the restyling of the Bankruptcy Rules, however, the romanettes in (A) were replaced with bullet points. The technical amendment to Rule 2007.1(b)(3)(B) corrects the reference to the romanettes and replaces them with bullet points. Judge Connelly explained that this is a technical amendment that would not benefit from public comment.

The members then discussed the proposed amendments.

A judge member asked if similar changes are required in Rule 2007.1(c)(1) and (3). Professor Bartell agreed that similar changes are needed in those paragraphs and agreed to make the additional changes. Later in the meeting, a practitioner member observed that conforming changes would be needed to the committee note, and Professor Gibson indicated that the committee note would be revised accordingly.

Following the discussion, upon motion and a second, and with no opposition, the Standing Committee approved recommending to the Judicial Conference final approval of the technical amendments to Rule 2007.1(b)(3)(B), along with the conforming amendments to Rule 2007.1(c)(1), and (c)(3) and the committee note as discussed above.

f. Amendments to Rule 3001(c)

Judge Connelly then presented the Advisory Committee’s request for the Standing Committee to recommend final approval by the Judicial Conference of a technical amendment to Rule 3001(c) to reflect a change to the numbering of the rule. The text of the proposed amendment appears on page 225 of the agenda book and the written report begins on page 214.

Judge Connelly and Professor Bartell explained that Rule 3001(c) addresses the supporting information required for a proof of claim. Prior to the restyling, Rule 3001(c)(2)(D) provided for sanctions if the claim holder “fails to provide any information required by this subdivision (c).” The restyling of Rule 3001 redesignated former subdivision (c)(2)(D)—the sanction provision—as (c)(3) and provided for sanctions for the failure “to provide information required by [(c)](1) or (2).” The restyled Rule’s new cross-reference inadvertently failed to encompass former Rule 3001(c)(3), which became Rule 3001(c)(4). The Advisory Committee approved a technical amendment that corrects the error by changing “information required by [(c)](1) or (2)” to read “information required by (c).” At the same time, it accepted a suggestion to reorder the numbered paragraphs in Rule 3001(c) so that the sanctions provision would come after all the provisions that it serves to enforce. Thus, the proposed technical amendments flip the order of what are currently Rules 3001(c)(3) and (4) and also amend what becomes Rule 3001(c)(4) to refer to “information required by (c).” Judge Connelly explained that this technical change is simply carrying out the intent of the rule, and that public comment would be superfluous.

The members then discussed the proposed amendments.

A judge member asked why Rule 3001(c)(3)(B) was not being moved up to become part of (c)(1). What the proposal would renumber as Rule 3001(c)(3)(B) provides that “On a party in interest’s written request, the creditor must send a copy of the writing described in (1) to that party within 30 days after the request is sent.” Professor Bartell said that the rule had always been that way.

Judge Bates asked whether this suggestion was independent from the proposed change to Rule 3001(c). Judge Connelly said that it was. Professor Struve suggested that the reason that the provision is located in what will become Rule 3001(c)(3)(B), and not in Rule 3001(c)(1), is that the provision is relevant *only* to the type of claim treated in Rule 3001(c)(3)(B) – that is, a claim based on an open-end or revolving consumer-credit agreement; as to other types of claims, Rule 3001(c)(1) already requires the creditor to file a copy of the writing described in Rule 3001(c)(1) with the proof of claim, so there would be no reason to separately require that the creditor send a copy of that writing upon request. Judge Bates said that while the Advisory Committee could separately consider the member’s suggestion, it seemed independent from the current proposal, which could move forward in the meantime.

With no further discussion, upon motion and a second, and with no opposition, the Standing Committee approved recommending to the Judicial Conference final approval of the technical amendment to Rule 3001(c).

2. Preliminary Drafts for Publication and Public Comment

a. Preliminary Draft of Proposed Amendments to Official Form 106C

Judge Connelly next presented the Advisory Committee’s request for the Standing Committee to approve publication for public comment on proposed amendments to Official Form 106C, which relates to property that can be claimed as exempt. The text of the proposed amendment begins on page 255 of the agenda book and the written report begins on page 214.

Judge Connelly reported that the proposed amendment to the form includes a total amount of assets being claimed as exempt. This would help bankruptcy trustees comply with their statutory obligation to report assets exempted. Judge Connelly said that this reporting figure is not taking a position on what property is exempted but strikes a balance between the public’s need for information and not being overly burdensome on the parties.

After an opportunity for discussion with no comments from the members, upon motion and a second, and with no opposition, the Standing Committee approved publication for public comment on the proposed amendment to Official Form 106C.

D. Advisory Committee on Civil Rules – Judge Robin L. Rosenberg, Chair

Judge Robin Rosenberg presented action items on behalf of the Advisory Committee on Civil Rules, which last met on April 1, 2025, in Atlanta, Georgia. The Advisory Committee’s report and the draft minutes of its last meeting are included in the agenda book beginning at page 287.

1. Amendments for Final Approval

The Advisory Committee had no requests for final approval.

2. *Preliminary Drafts for Publication and Public Comment*

a. Preliminary Draft of Proposed Amendments to Rule 41(a)

Judge Rosenberg began her report with the Advisory Committee's request that the Standing Committee approve publication for public comment on proposed amendments to Rule 41(a) relating to voluntary dismissal of actions. The text of the proposed amendment begins on page 328 of the agenda book and the written report begins on page 290.

Judge Rosenberg explained that the Advisory Committee was proposing two amendments to Rule 41(a). The first proposed amendment clarifies that the rule permits the dismissal of one or more claims in an action rather than only allowing dismissal of the entire action. She noted that many courts already allow such flexibility without problems arising, and permitting partial dismissal is consistent with the policy reflected throughout the rules of narrowing the issues pretrial. The second proposed amendment is necessitated by the first and clarifies that only the signatures of active parties who remain in a case are required to sign a stipulation of dismissal. Judge Rosenberg said that requiring the signatures of nonactive parties creates opportunities for such parties to stymie settlements if they either oppose the stipulation or cannot be found to provide their signature.

Judge Rosenberg reminded the Standing Committee that it had considered the proposed amendments to Rule 41 at its January 2025 meeting. Based on the Standing Committee's feedback at that meeting, the Advisory Committee made several changes. First, the Advisory Committee decided not to propose amending Rule 41(d) to permit a judge to award costs when the plaintiff had previously dismissed and refiled "one or more claims." (Currently, Rule 41(d) provides that the judge may award costs to the defendant "[i]f a plaintiff who previously dismissed an action files an action based on or including the same claim against the same defendant.") Second, the Advisory Committee clarified that the cutoff for unilateral dismissal of a claim is the filing of an answer or a motion for summary judgment by the party opposing the claim. Third, the Advisory Committee decided to retain the proposed language in Rule 41(a)(1)(A)(ii) that would require that a stipulation of dismissal be signed by all parties who have appeared and remain in the action. Although a participant in the January 2025 Standing Committee meeting had raised concerns about the proposed amendment's interaction with Rule 54(b), the Advisory Committee found the language in the text was sufficiently clear but added to the committee note information to clarify the amendment's purpose.

The members then discussed the proposed amendments.

A judge member asked why, under Rule 41(a)(1)(A)(i), a motion for summary judgment cuts off the plaintiff's opportunity to unilaterally dismiss its claims but a Rule 12(b) motion does not. Professor Bradt explained that the existing cutoffs have been part of the rule since 1946. In addition, adding Rule 12(b) motions to the list of events that cut off a plaintiff's right to unilaterally dismiss might create an inconsistency with Rule 15(a), which allows amendment of a complaint after receipt of a motion to dismiss under Rule 12.

Professor Bartell noted that the amendment to Rule 41(a)(1)(A) (page 328, line 6) would change "the plaintiff" to "a plaintiff," and asked whether the amendment would allow a single plaintiff to

dismiss an action unilaterally even if there are other plaintiffs that oppose dismissal. Professor Bradt responded that under the current rule with “the plaintiff,” a plaintiff in a multi-plaintiff case can dismiss their own action, so that problem was in the rule before. Judge Bates agreed that the problem would have existed, but the language change makes the problem different. A judge member said that “the plaintiff” could be read as the plaintiff with respect to a particular claim, but “a plaintiff” could be read as broader. Judge Bates suggested the sentence could read “a plaintiff may dismiss *its* action,” and a member agreed with the idea of saying “a plaintiff may dismiss its action or one or more of its claims.” Professor Bradt commented that this would not require a change to the proposed amendment to Rule 41(a)(2) but would require conforming changes to the first paragraph of the committee note.

Professor Cooper expressed concern about making the text “a plaintiff may dismiss an action.” He questioned if it is one plaintiff’s action if there are multiple plaintiffs, proposing a better rule could be “a plaintiff may dismiss its part of an action or one or more claims.” Professor Bradt said that he was not sure that “part of an action” is a familiar term and that he would be reluctant to add it. Professor Cooper suggested, alternatively, “a plaintiff may dismiss one or more or all of its claims.” Professor Bradt said that the Advisory Committee wanted to keep the word “action” in the rule to avoid concerns that the rule no longer permits the dismissal of an entire action.

Professor Struve suggested that the Standing Committee could decide to use “a plaintiff may dismiss its action or one or more of its claims” in the text and clarify about Professor Cooper’s point in the committee note. For example, the committee note at line 37 could read: “A plaintiff may accomplish dismissal of either its action—if it is the sole plaintiff—or one or more of its claims in an action that includes additional plaintiffs.” Professor Bradt said that a concern with this text is that a sole plaintiff may also dismiss one or more of its claims. Professor Struve responded that one could revise the second part of that note sentence to say, “one or more of its claims, whether it is the only plaintiff or not.” Professor Bradt, however, wondered whether this issue would cause real-world confusion and said that the Advisory Committee could learn more in the public comment period.

Judge Rosenberg then asked whether the beginning of the committee note’s first paragraph as modified was clear. It read: “Rule 41 is amended in two ways. First, Rule 41(a) has been amended to add language clarifying that a plaintiff may voluntarily dismiss ‘one or more of its claims’ in a multi-claim case. A plaintiff may accomplish dismissal of either its action or one or more of its claims unilaterally” A practitioner member suggested changing the rule text to “a plaintiff may dismiss one, some, or all of its claims in an action without a court order....” Professor Bradt said he did not object, but that the term “one or more claims” was the result of style revision; a previous draft had said “a claim or claims.” Thus, Professor Bradt said he would want advice from the style consultants first.

Another practitioner member asked if there would still be a risk – under the other practitioner member’s proposed language – of a court interpreting the reference to “one, some, or all” of a plaintiff’s “claims” to mean that a plaintiff could dismiss one or more claims but not the action. Professor Bradt suggested changing the phrase to “a plaintiff may dismiss its action or one, some, or all of its claims.” Judge Rosenberg asked if “some” was unnecessary. The practitioner member who had proposed the “one, some, or all” phrasing explained that the goal was to make clear that if it’s a multi-plaintiff action, the action itself is not dismissed if one of the plaintiffs dismisses all

of its claims. Judge Rosenberg said that Rule 41’s title, Dismissal of Actions, suggests that the rule allows a plaintiff to dismiss its action. Professor Bradt questioned whether the Committee could imagine a judge holding that the proposed “one, some, or all of its claims in an action” phrasing does not allow a plaintiff to dismiss its action. Professor Garner indicated that he could not imagine a textualist judge reading the rule that way.

Professor Struve thought that preserving the idea of dismissal of an action as its own concept could be valuable, since the interpretation of whether an order has triggered the start of the time to appeal might depend on whether the claims have been dismissed or the action has been dismissed. Professor Bradt then proposed that the rule could read: “a plaintiff may dismiss its action or one, some, or all of its claims in the action....” Professor Kimble, however, said he supported “may dismiss its action or one or more of its claims.”

Judge Bates reminded the committee that the proposal was going out for public comment and that the goal should be to send out for public comment language that seems acceptable, if the committee cannot think of better language. Professor Coquillette said it was time for public comment and generally supported addressing the issue in the text of the rule. Judge Rosenberg suggested that the text of Rule 41(a)(1)(A) could read in relevant part “a plaintiff may dismiss its action or one or more of its claims without a court order....” The accompanying change to the first paragraph of the committee note would read “a plaintiff may voluntarily dismiss ‘one or more of its claims’ in a multi-claim case. A plaintiff may accomplish dismissal of either its action or one or more of its claims unilaterally....”

Following the discussion, upon motion and a second, and with no opposition, the Standing Committee approved publication for public comment on the proposed amendments to Rule 41, with the revisions to the text and note summarized by Judge Rosenberg in the preceding paragraph.

b. Preliminary Draft of Proposed Amendments to Rules 45(c) and 26(a)(3)(A)(i)

Judge Rosenberg next presented the Advisory Committee’s request for the Standing Committee to approve publication for public comment on proposed amendments to Rule 45(c) and Rule 26(a)(3)(A)(i). The goal of the proposed amendment to Rule 45 is to permit a court to command a distant witness to provide remote trial testimony. The proposed amendment to Rule 26 provides that the parties’ pretrial disclosures must state whether the party expects to present witness testimony by remote means. The text of the proposed amendment to Rule 26 begins on page 325 of the agenda book, the text of the proposed amendment to Rule 45(c) begins on page 337, and the written report for the proposed amendments begins on page 292.

Judge Rosenberg explained that the amendments address *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023), which held that the court’s authority to issue a subpoena for trial testimony extends only within the “subpoena power” of the court. The *Kirkland* court reached this conclusion despite the 2013 committee note to Rule 45, which had noted the court’s authority to command a distant witness to provide remote trial testimony. This decision has even affected cases involving subpoenas issued during discovery rather than subpoenas for trial testimony. She noted that the Standing Committee previously raised a question about whether changing Rule 45(c) would affect the unavailability criterion under Civil Rule 32(a)(4) (addressing use of the deposition of a witness who is unavailable) and Evidence Rule 804(a) (addressing criteria for considering a witness

unavailable for purposes of Rule 804(b)'s hearsay exceptions). The Advisory Committee determined that clarifying the subpoena power does not affect these other rules. Judge Rosenberg said that the proposed changes to Rule 45(c)(2) address remote testimony and set the "place of attendance" as "the location where the person is commanded to appear in person."

Professor Marcus stated that the subcommittee continues to look at questions on remote testimony generally and that this change simply recognizes that – once a court decides that remote testimony is warranted – the court should be able to command the witness to provide that testimony. Rule 45(c) is designed to protect the witness against burdens, but it should not impede the court's ability to order remote testimony when remote testimony is appropriate. Judge Rosenberg added that district courts have disagreed about whether they have the power to command distant trial witnesses to appear by remote testimony. The proposed amendment to Rule 26 complements the proposed amendment to Rule 45(c) by requiring pretrial witness lists to disclose "whether the testimony will be in person or remote." This requirement will lead the parties to discuss remote testimony during the pretrial conference to avoid a surprise closer to trial.

The members then discussed the proposed amendment.

Professor Bartell noted that Rule 45(c)(1) does not use the term "place of attendance," and she suggested that the term was thus not an apt choice for proposed new Rule 45(c)(2). Professor Marcus responded that Rule 45(c)(1) permits a subpoena to "command a person to attend a trial, hearing, or deposition" and proposed Rule 45(c)(2) then defines the place of attendance and this should not be hard to follow. Professor Bartell argued that proposed Rule 45(c)(2) should be rewritten to say something like, "A subpoena may command a person to attend remotely under Rule 45(c)(1) at the location where the person is." Professor Marcus said he did not see a problem with the proposal as drafted, but that public comment would show whether others see a problem. Professor Struve agreed with Professor Marcus and argued that—though Rule 45(c)(1) does not use the specific phrase "place of attendance"—it uses the *concept* of a place of attendance because Rule 45(c)(1)(A) talks about that place being within 100 miles of the person's residence and Rule 45(c)(1)(B) talks about that place being within the state where the person resides.

Judge Bates pointed out that the text of proposed Rule 45(c)(2) uses "the place of attendance for remote testimony is the location where the person is commanded to appear in person," while the committee note's third paragraph instead refers to the "place where the person must appear to provide the remote testimony." He asked if the Advisory Committee intended any difference in these formulations. Professor Marcus thought that the committee note explains the rule clearly.

Professor Marcus noted that the Advisory Committee also recommended a corresponding amendment to Rule 26(a)(3)(A)(i) to add "and whether the testimony will be in person or remote." This would alert everyone in the case to the prospect of remote testimony. In the second sentence of the committee note to Rule 26 – which began "Because the rule presently requires" – Judge Bates suggested changing "the rule" to "this rule" to make clear that the reference is not to Rule 43 (mentioned in the preceding sentence). But after concerns were expressed that "this rule" might also be ambiguous, "the rule" was changed to "Rule 26." After Professor Garner stated that "presently" traditionally meant "in a moment," consensus also favored deleting "presently." At the end of the same sentence, Judge Bates suggested adding "upon court approval." Though a judge

member later suggested deleting the note’s second sentence, no consensus developed in favor of such a deletion.

Pointing to the last sentence of the Rule 26 committee note – which states that the amendment “alerts the parties and the court that a party expects to present one or more witnesses remotely” – Professor Bartell asked if the court would already be aware of a party’s intention to call a remote witness, given that the court’s approval would be required in order for remote testimony to occur. Professor Marcus responded that the Rule 26(a) disclosure would alert the court to the fact that somebody proposes to have a witness testify remotely, which would also require court approval. Judge Bates said that he did not think this pretrial disclosure requirement anticipates that there has already been a decision on whether to allow remote testimony. A practitioner member suggested changing “expects” to “proposes.” Judge Rosenberg and Professor Marcus agreed. A judge member objected that using “proposes” would cause the committee note to diverge from the text of Rule 26(a)(3)(A)(i), which uses the phrase “expects to present.” But the practitioner member pointed out that there is a distinction between the witnesses the party expects to present and the separate issue whether the testimony of those witnesses will be remote: a party can *expect* to present witnesses (because the party gets to choose its witnesses) while only *proposing* to do so remotely. Judge Rosenberg agreed with the distinction drawn by the practitioner member, as did another practitioner member.

Following this discussion, Judge Rosenberg summarized the changes to the committee note. The second sentence of the committee note would read “Because Rule 26 requires disclosure of witnesses a party ‘expects to present,’ it should be understood to include witnesses who will testify remotely upon court approval.” In the third sentence of the committee note, “a party expects” was changed to “a party proposes.”

Upon motion and a second, and with no opposition, the Standing Committee approved publication for public comment on the proposed amendments to Rule 45(c) and Rule 26(a), with the changes to Rule 26’s committee note that were summarized in the preceding paragraph.

c. Preliminary Draft of Proposed Amendment to Rule 45(b)

Judge Rosenberg next presented the Advisory Committee’s request for the Standing Committee to approve publication for public comment on proposed amendments to Rule 45(b)(1). The proposed amendments specify that the methods for service of a subpoena are personal delivery, leaving it at the person’s abode with someone of suitable age and discretion who resides there, sending it by mail or commercial carrier if it includes confirmation of receipt, or another method authorized by the court for good cause. The amendment would also add a default 14-day notice period and provide that the tender of witness fees is not required to effect service of the subpoena so long as the fees are tendered upon the witness’s appearance. The text of the proposed amendment begins on page 332 of the agenda book and the written report begins on page 296. The members were also provided with a handout highlighting style changes made subsequent to the publication of the agenda book (the handout was incorporated into the agenda book at page 487).

Judge Rosenberg explained that the proposed amendments address comments received by the Advisory Committee over the years about the ambiguity of the requirement in Rule 45(b)(1) of “serving” the witness with a subpoena and also tendering the witness fee to the witness.

Specifically, Rule 45(b)(1)’s use of “delivering a copy to the named person” without more created confusion and practical problems.

The members then discussed the proposed amendment.

Focusing on delivery to the named person by “delivering it to the individual personally” under proposed Rule 45(b)(1)(A)(i), Professor Bartell asked if a named person would always be an individual. Professor Marcus responded that a subpoena could initiate a Rule 30(b)(6) examination of an entity. Professor Bartell expressed concern that proposed Rule 45(b)(1)(A)(i)’s use of “individual” suggests that the named person must be an individual.

Judge Bates suggested that, in light of the amendment’s goal of clarifying the meaning of *service*, the portion of the rule that precedes the romanette-numbered paragraphs should conclude “Serving a subpoena requires:” rather than “Serving a subpoena requires delivering a copy to the named person by:”, as the focus should not be on defining “delivery.” Professor Marcus observed that the proposed language shown in the agenda book was borrowed from Rule 4(e)(2). Professor Garner supported Judge Bates’s suggestion that the rule say “Serving a subpoena requires: (i) personally delivering a copy to the named person” Judge Rosenberg agreed and confirmed that romanette (i) would read “personally delivering a copy to the named person,” but that the other romanettes would not change. Professor Marcus said that this would address Professor Bartell’s concern.

Professor Struve questioned the proposed placement of “personally” before “delivering”: the placement created ambiguity because it could be read to require the *server* to deliver the document personally (i.e., to mandate that the lawyer whose subpoena it is cannot delegate the task of service). Rule 4(e)(2)(A), she noted, places the “personally” at the end (“to the individual personally”). Judge Bates responded that saying “to the named person personally” would be awkward. After a discussion of whether “personally” could be deleted, the participants concluded that it should not. A judge member said that the meaning of Rule 45(b)(1)(A)(i) depends on the word personal. Professor Garner suggested using the term hand-delivering. Judge Bates agreed that hand delivery was likely what the provision means by “personally.” Professor Cooper said that the advantage of “personally” is that it helps provide context for “delivering,” which courts have interpreted to have different meanings (e.g., mail), and that “hand-delivering” could create new interpretive problems.

An academic member observed that the proposed amended rule imports language from Rule 4, and he would be nervous about adding language that deviates from Rule 4. Judge Rosenberg confirmed that the idea was to mimic the language in Rule 4. Judge Bates asked whether “personally delivering a copy to the named person” is any different from “delivering a copy to the named person personally.” Professor Garner supported using “person personally,” even though it may strike some readers as awkward. Professor Hartnett suggested “delivering it personally to the named person” to retain the meaning but move the words slightly away from each other. A judge member supported using “named person personally” to stay consistent with whatever caselaw that has developed. Professor Kimble advocated using the language shown in the agenda book, but Professor Bartell reiterated that Rule 4 applies only to individuals, whereas Rule 45(b) applies to all persons (including business entities), so the term “individual” (used in proposed romanette (i) in the agenda book) would be inappropriate for Rule 45(b). Judge Bates supported using “named

person” in order to avoid suggesting there was a substantive change; the remaining question, he noted, was where to put the word “personally.”

Judge Bates asked if the Advisory Committee would support revising the second sentence of Rule 45(b)(1)(A) to read: “Serving a subpoena requires: (i) delivering a copy to the named person personally” Professor Marcus agreed. A judge member asked why “named person” is not needed in the other romanettes. Professor Garner responded that romanette (i) identifies the target as “the named person” and the subsequent romanettes inherit that meaning (such that repeating “named person” is unnecessary). The judge member asked if a reader would understand that the modifier carries through to the other romanettes just as it would if the modifier were in the introduction. Professor Garner said the Committee had employed this usage frequently.

A practitioner member asked whether a subpoena directed to a business organization could be left at its place of business, and if not, whether “place of business” should be added to romanette (ii). Judge Bates noted that the rule should not permit a party to serve a subpoena to an individual at their place of work. Professor Cooper suggested that “delivering ... to the named person personally” under revised romanette (i) should encompass service on a business at its office.

A practitioner member suggested revising the first sentence in the committee note to state that “Rule 45(b)(1) is amended to clarify the means of serving the subpoena.” Judge Bates asked whether the reference to “delivery” in the committee note’s second paragraph should be changed to refer to service. Professor Marcus suggested the term “effective service,” (not in quotation marks), and Judge Bates agreed, as did a judge member.

Judge Rosenberg summarized the changes around which consensus had developed (apart from the style changes highlighted on the handout, which were also adopted by consensus). Rule 45(b)(1)(A)’s second sentence was revised so that it commenced: “Serving a subpoena requires: (i) delivering a copy to the named person personally;” The first sentence of the committee note was changed to read: “Rule 45(b)(1) is amended to clarify the means of serving a subpoena.” In the first sentence of the second paragraph of the committee note, “delivery” was changed to “effective service.”

Following the discussion, upon motion and a second, and with no opposition, the Standing Committee approved publication for public comment on the proposed amendments to Rule 45(b), with the changes summarized in the preceding paragraph, as well as the style changes shown in the handout.

d. Preliminary Draft of Proposed Amendment to Rule 7.1(a)

Judge Rosenberg next presented the Advisory Committee’s request for the Standing Committee to approve publication for public comment on proposed amendments to Rule 7.1(a). The amendments would mandate disclosure of corporate “grandparents” and “great-grandparents” in which a judge may hold a financial interest that requires recusal. The text of the proposed amendment begins on page 322 of the agenda book and the written report begins on page 298.

Judge Rosenberg explained that the Advisory Committee proposed the amendment not because of concerns that judges have acted in a biased manner, but because a judge presiding over a case in which she has an arguable financial interest can threaten perceptions of the court’s legitimacy. To

address the perception-of-bias issue and allow judges to make more informed decisions about recusal, there are two proposed changes. First, the proposed amendment replaces references to a “corporate party” with the broader term “business organization.” The Advisory Committee viewed “corporations” as too narrow because there are many entities that are not corporations, and “business organizations” is the most common and generally understood term. Second, the proposed amendment requires disclosure of “a parent business organization” and “any publicly held business organization that directly or indirectly owns 10% or more of” a party. The term “parent” has been part of the various federal disclosure rules since their inception and has not caused significant problems.

Judge Rosenberg also stated that the Rules Law Clerk and Reporters canvassed a wide swath of disclosure requirements, and the two dominant approaches were to use either a broad catch-all term (such as “affiliates”) or a lengthy list of various specific business relationships. However, the former approach is overinclusive and results in important information being buried in a vast disclosure. The latter approach can be over- and under-inclusive and requires constant maintenance to account for evolving relationships. The Advisory Committee was also informed by the February 2024 guidance by the Codes of Conduct Committee that directs a judge to focus on whether a parent corporation that does not wholly own a party has control of a party, advising that 10% ownership creates a rebuttable presumption of control. Professor Bradt said that the effort has been to expand the scope of the rule to better comply with the Codes of Conduct Committee guidance and be consistent with the approach taken in the 1998 committee note to Appellate Rule 26.1.

After an opportunity for discussion and no comments from the members, upon motion and a second, and without opposition, the Standing Committee approved publication for public comment on the proposed amendments to Rule 7.1.

E. Advisory Committee on Criminal Rules – Judge James Dever, Chair

Judge Dever presented one action item on behalf of the Advisory Committee on Criminal Rules, which last met on April 24, 2025, in Washington, D.C. The Advisory Committee’s report and the draft minutes of its last meeting are included in the agenda book beginning at page 357.

1. *Amendments for Final Approval*

The Advisory Committee presented no requests for final approval.

2. *Preliminary Drafts for Publication and Public Comment*

a. Preliminary Draft of Proposed Amendments to Rule 17

Judge Dever presented the Advisory Committee’s request for the Standing Committee to approve publication for public comment on proposed amendments to Rule 17 relating to subpoenas in criminal cases. The text of the proposed amendment begins on page 373 of the agenda book and the written report begins on page 358.

Judge Dever explained that this item stems from a 2022 proposal by the New York City Bar Association and letters from the National Association of Criminal Defense Lawyers. Judge Dever also noted that the development of the proposed amendments had taken significant effort, but that

the Advisory Committee voted unanimously to recommend publication of the proposed amendment to Rule 17.

Judge Dever reported that the core of the issue raised by the proposals was that Rule 17 had been largely unchanged since 1944 (apart from some style changes and changes relating to the Crime Victims Rights Act). The proposals focused on the problems, from a defense perspective, entailed in obtaining information from third parties. The Advisory Committee's subcommittee – chaired by Judge Jacqueline Nguyen – had begun by assessing whether there was a problem. The subcommittee held many meetings on the project, and the Advisory Committee had discussed it over the course of six meetings and had consulted widely.

The Advisory Committee, Judge Dever noted, had learned that Rule 17 practice varies widely across the country, and in some districts, there is essentially no third-party subpoena practice under Rule 17. One reason for the disparities in Rule 17's application, Judge Dever suggested, was that there were only two U.S. Supreme Court cases on point (*Bowman Dairy v. United States*, 341 U.S. 214 (1951), and *United States v. Nixon*, 418 U.S. 683 (1974)), and those cases contain language that some lower courts have interpreted restrictively. After testing a more expansive proposed rule with defense lawyers and prosecutors, the Advisory Committee determined that it should take a more incremental approach to addressing third-party discovery.

Judge Dever then explained the proposed changes to Rule 17, which were also summarized starting at page 363 of the agenda book. Features of the proposed rule included specifying what proceedings other than trial Rule 17 applies to, codifying a loosened *Nixon* standard, clarifying when a motion and order are required, providing when a party may make its request ex parte, addressing the place of production, preserving Rule 16's disclosure policies, and clarifying which subparts of Rule 17 apply to different proceedings. Judge Dever reiterated that the proposal is for public comment and anticipated that the proposed amendment, if published, would receive helpful comments. He thanked the DOJ and Subcommittee Chair and members for their work.

Professor Beale added that the input from defense and prosecution practitioners was very divergent at first: defense lawyers wanted major changes while the DOJ saw no current problem with Rule 17. It was remarkable that the ultimate proposal attained unanimous support from the Advisory Committee members. It would “raise the floor” of practice in those districts where currently there is no way for the defense to gain information from third parties.

The members then discussed the proposed amendment.

In Rule 17(c)(2)(A) (concerning non-grand-jury subpoenas), Judge Bates suggested inserting “evidentiary” between “additional” and “hearing.” Professor Beale agreed. Also in Rule 17(c)(2)(A), Judge Bates pointed out that the placement of the phrase “that the court permits” created ambiguity as to whether it referred to the subpoena or the hearing. Professor Beale stated that the phrase should refer to the subpoena. Consensus formed in favor of revising the last clause of proposed Rule 17(c)(2)(A) to read “or—with the court's permission in an individual case—for any additional evidentiary hearing.” A judge member asked whether it was really necessary to require the court's permission in an individual case once the word “evidentiary” was added to the rule. Professors Beale and King said yes, explaining that the Advisory Committee did not want

this amendment to lead to a proliferation of third-party subpoenas in a whole range of evidentiary hearings.

Judge Bates also suggested saying “to produce the designated items to the court” rather than “to produce to the court the designated items” in Rule 17(c)(5). Professor Beale agreed. Judge Bates also suggested deleting “stage” from line 441 of the committee note.

Judge Bates observed that an objective of the proposal is to address the variance in subpoena practice. However, he noted, the proposal retains flexibility for individual judges to continue that variance – for example in proposed Rules 17(c)(2)(C) and (F). Judge Dever agreed and explained that the proposal reflects an incremental approach to changing the rule. Professor Beale noted that Judge Bates’s comment relates to the ability of judges or districts to opt out. The other side of that is that the proposed rule states a new default rule with substantial leeway to deal with problems in an individual case or certain kinds of cases. Professor King said that the new default is not a strong one: it is a response to decisions that made assumptions about what the language in the current rule means. Just saying what the rule means will reduce some variance, and variance was left where the Advisory Committee heard it was important. Judge Bates thanked Ms. Shapiro and the DOJ for their work during the process and suggested getting comments from the Magistrate Judges Association.

A practitioner member expressed support for the proposed rule but highlighted the phrase “non-grand-jury subpoena” as a new term that is not in the existing rules. He asked whether a grand jury subpoena is a Rule 17 subpoena. The member had not thought that the government needed to follow a particular process when issuing a grand jury subpoena. Professor Beale responded that the Supreme Court had suggested in *Nixon* that Rule 17 applied to grand jury subpoenas, but she stressed that the Advisory Committee did not want to draft a rule regulating grand jury subpoenas for all purposes. The member suggested explaining the term “non-grand-jury subpoena” in the committee note.

A judge member pointed out language in the committee note (on page 387) providing that a “court has discretion to require that those subpoenas be authorized by motion and court order” and said that a subpoena cannot technically be authorized by motion. Rather, the motion would be filed and then the court would enter an order, as indicated by references to filing a motion and obtaining a court order in Rule 17(c)(3) and (4). To make the references consistent, the member suggested changing the committee note to read “the court has discretion to require that those subpoenas be authorized only after filing a motion and obtaining a court order.” The member suggested that the language in Rule 17(c)(3)(A) be similarly changed. The judge member also suggested, for clarity, positive phrasing for Rule 17(c)(2)(C), which would read “a motion and order are required before service of a non-grand-jury subpoena in (3) or (4) or if a local rule or court order requires them.”

To respond to these suggestions, Professor Beale referenced the earlier discussion about how to phrase Appellate Rule 29(a)(7). She said that this language was drafted to respond to concerns that the rule was requiring too many motions and would cause a burden. Thus, Professor Beale preferred stating that motions “are not required, except...” To help emphasize the point, Professor Capra suggested revising the heading of Rule 17(c)(2)(C) to read “Motion and Order Not Ordinarily Required.” Professor Garner suggested “only by court order on motion,” which indicates a court cannot do it sua sponte. The judge member agreed. Judge Dever said this would

change Rule 17(c)(3)(A) to read “only by court order upon motion” rather than “only on motion and by court order.”

A judge member asked about Professor Capra’s idea to change the title of Rule 17(c)(2)(C) to “Motion and Order Not Ordinarily Required.” Judge Bates questioned whether the heading could say “Ordinarily” when that word does not appear in the text of Rule 17(c)(2)(C). Professor Garner responded that “Not Ordinarily Required” was an accurate summary of the provision, which states that the motion and order “are not required ... unless.” Another judge member suggested titling the provision “Requirement For Motion and Order.” Judge Dever, however, expressed a preference for Professor Capra’s proposed title, explaining that the Advisory Committee wanted to emphasize that a motion and order is not ordinarily required.

A judge member expressed support for the proposed amendment but had a few questions about the text. First, should Rule 17 emulate Rules 16 and 16.1, which explicitly provide authority for the district court to regulate discovery? To this end, in proposed Rule 17(c)(7), he suggested inserting “or on its own” after “On motion made promptly” to indicate that the court can act sua sponte to quash or modify a subpoena. Professor Beale said the Advisory Committee could discuss the idea after public comment. Judge Dever commented that the only way that the subpoena would come to the court’s attention would be if there were a motion to quash. Second, the judge member suggested deleting “under these rules” from Rule 17(c)(6) because a right to discovery can have a statutory or constitutional basis. Professor Beale and Judge Dever agreed. Third, the judge member suggested revising Rule 17(h) to refer to “a statement of a trial witness or of a prospective trial witness” because Rule 32(i) provides discretion to deny a witness at sentencing. The member pointed out that Rule 17 was granting the authority to subpoena witnesses for sentencing. Professor King responded that Rule 17(h) refers only to subpoenaing the witness’s *statement*, not the witness. Professor King and Judge Dever said that Rule 17(h) is essentially a rules version of the Jencks Act (that is, Rule 17(h) closes off what would otherwise look like a discovery pathway for early discovery of witness statements) but that public comment will be helpful. Professor King clarified that including sentencing in Rule 17 means only that getting a subpoena for sentencing is not prohibited – not that a subpoena will necessarily issue. Another judge member noted that Rule 26.2(g)(2) (applying Rule 26.2 to sentencing) governs production of the witness’s prior statement but not the witness themselves. Professor Beale agreed, and summed up that where Rule 17 would allow a subpoena, it does not allow a subpoena to be used as an end-run around the Jencks principle codified in Rule 26.2.

Professor Beale summarized the modifications to the proposed amendment. The modifications changed Rule 17(c)(2)(A) to read “When Available. A non-grand-jury subpoena is available for a trial; for a hearing on detention, suppression, sentencing, or revocation; or—with the court’s permission in an individual case—for any additional evidentiary hearing.” The caption of Rule 17(c)(2)(C) was changed to “Motion and Order Not Ordinarily Required.” In Rule 17(c)(3)(A), “only on motion and by court order” was changed to “only by court order upon motion.” In Rule 17(c)(5), “require the recipient to produce to the court the designated items” was changed to “require the recipient to produce the designated items to the court.” In Rule 17(c)(6), “under these rules” was deleted. In the committee note at page 387, line 323, “authorized by motion and court order” was changed to “authorized by court order upon motion.” On page 391, line 441, “stage” was deleted.

Following the discussion, upon motion and a second, and with no opposition, the Standing Committee approved publication for public comment on the proposed amendments to Rule 17, with the changes discussed in the preceding paragraph.

3. INFORMATION ITEMS – REPORTS OF THE ADVISORY COMMITTEES

Following the Standing Committee’s conclusion of the action items, Judge Bates announced that he would have to leave, and asked Judge Dever to preside over the remainder of the meeting. Prior to this transition, Judge Bates clarified for the record that the Standing Committee had approved publication for public comment on proposed Civil Rule 45(c).

Prior to departing, noting that it was his last Standing Committee meeting, Judge Bates also extended his thanks to everyone and appreciation for being on the Standing Committee and offered to be of assistance when needed.

Judge Dever then turned to the information items, noting that the Standing Committee members had read the Advisory Committee reports and that those presenting the information items should defer to those reports and use their time to highlight issues for any comments from the members.

A. Advisory Committee on Evidence Rules – Judge Jesse M. Furman, Chair

Professor Capra, who presented on behalf of the Advisory Committee in light of Judge Furman’s departure from the meeting, highlighted several information items. The written report on information items begins on page 59 of the agenda book.

1. *Artificial Intelligence (AI) and Deepfakes*

Professor Capra reported that the Advisory Committee decided to hold off on proposing any rule amendments regarding the issue of deepfakes and that there had not been many identified deepfakes going through the federal courts. The Advisory Committee will continue to monitor whether deepfakes are challenging the courts. In the meantime, it has a working draft set out on page 60 of the agenda book of a proposed Rule 901(c) addressing deepfakes. The draft rule would create a two-step process where the opponent of the evidence must make a showing that the offered evidence is a possible deepfake. The burden then shifts to the proponent to show by a preponderance of the evidence that it is not a deepfake.

2. *Rule 902(1) and Indian Tribes*

Professor Capra reported on the Advisory Committee’s consideration of whether Rule 902(1) regarding self-authenticating government records should be amended to include records of federally recognized Indian tribes. The inability to have self-authenticating records from tribes has created certain problems in cases involving proof of Indian status. Professor Capra noted that the DOJ supports the suggestion to add Indian tribes to Rule 902(1), but it was opposed by the public defender representative. Professor Capra said that the Advisory Committee is conducting outreach to learn the views of tribes on the issue.

3. *Supreme Court Fellow Project on Rule 706*

Professor Capra noted that Samantha Smith, a Supreme Court Fellow, made a presentation to the Advisory Committee on research relating to Rule 706, which the Advisory Committee has taken under advisement.

B. Advisory Committee on Appellate Rules – Judge Allison Eid, Chair

Judge Eid reported briefly on three information items. The written report on information items begins on page 109 of the agenda book. First, the issue regarding intervention on appeal is awaiting further research. Second, the Advisory Committee is staying its consideration of the issue regarding reopening the time to appeal under Rule 4(a)(6), pending the Supreme Court's decision in *Parrish v. United States*.⁵ Third, the Advisory Committee is looking at limits on administrative stays. A judge member suggested that the Advisory Committee study appeal waivers as well.

C. Advisory Committee on Bankruptcy Rules – Judge Rebecca Connelly, Chair

Judge Connelly referred the Standing Committee to the written materials, beginning on page 215 of the agenda book, for a report on two information items.⁶

D. Advisory Committee on Civil Rules – Judge Robin Rosenberg, Chair

Judge Rosenberg and Professor Marcus reported on six information items.

1. *Filing under Seal*

Judge Rosenberg noted that the report for this item begins on page 304 of the agenda book and directed the Committee's attention to the questions appearing on page 308. The Advisory Committee would welcome the Standing Committee's feedback on three questions: (1) should the Advisory Committee try to develop nationally uniform procedures for handling motions to seal? (2) if so, how could it obtain information to inform a decision about what procedures to set in the rule? and (3) if the Advisory Committee decides not to recommend adoption of a national rule that prescribes procedures, is there value nonetheless in amending the rules to state that the standard for sealing court files differs from that for protective orders?

A judge member suggested that former Judge Gregg Costa would be a good resource on the issue of the prevalence and abuse of sealing.

2. *Remote Testimony*

Judge Rosenberg said that the report for this item begins on page 308 of the agenda book. She reported that this relates to Rules 43(a) and 43(c) and that the Advisory Committee would be

⁵For purposes of these minutes, it is noted that two days after the Standing Committee meeting, the Supreme Court decided *Parrish*. The citation to the decision is *Parrish v. United States*, 145 S. Ct. 1664 (2025).

⁶As referenced on the meeting agenda, the information items pertain to the withdrawal of a proposed amendment to Rule 1007(h) and two suggestions to allow special masters to be used in bankruptcy cases and proceedings.

gathering more information about whether Rule 43(a) should be changed. The Advisory Committee is considering whether to make Rule 43(a) less restrictive.

A judge member observed that former Texas Supreme Court Chief Justice Nathan Hecht has become a spokesman for the importance of remote testimony and participation.

3. Third-Party Litigation Funding

Judge Rosenberg reported that the Advisory Committee is studying the issue of third-party funding of litigation and has found that there is sharp disagreement over what is meant by “third-party litigation funding.” She said that a series of nine questions appears on page 315 of the agenda book and requested the Standing Committee’s feedback on them. The threshold question is how to describe the arrangements that might trigger a disclosure obligation.

4. Cross-Border Discovery Subcommittee

Judge Rosenberg reported that the Advisory Committee is retaining its cross-border discovery subcommittee, but the subcommittee has exhausted its research and has not found a need for a rule.

5. Rule 55 Default and Default Judgment Rule

Professor Marcus reported that a FJC study showed that in practice, Clerks of Court rarely enter default judgments in cases where the rule text seems to direct them to do so. Professor Marcus invited thoughts on the matter.

6. Random Case Assignment

Judge Rosenberg reported that the Advisory Committee will continue to monitor implementation of the Judicial Conference’s March 2024 guidance on random case assignment. A judge member pointed out Professor Samuel Issacharoff’s work on this topic.

E. Advisory Committee on Criminal Rules – Judge James Dever, Chair

Judge Dever reported on information items contained in the Committee Report beginning on page 367 of the agenda book. After Judge Dever reported on these items, a judge member suggested that the Advisory Committee should also look into deferred prosecution agreements, and Judge Dever undertook to mention that suggestion to Judge Mosman (the incoming Chair of the Criminal Rules Committee). The judge member also highlighted the circuit split (grounded in Criminal Rule 32) over whether a mismatch between oral and written sentencing conditions requires resentencing; Judge Dever agreed that there is a circuit split on that issue.

1. Rule 49.1 - References to Minors by Pseudonyms and Full Redaction of Social Security Numbers

Judge Dever reported that the Rule 49.1 subcommittee has unanimously agreed to propose an amendment to Rule 49.1 to require references to minors by pseudonyms, and the Standing Committee will likely receive such a proposal at its next meeting. He also reported that a proposal

for the complete redaction of social security numbers in public filings will likely be considered by the Advisory Committee at its fall 2025 meeting.

2. Rule 40 - Clarifying Procedures for Previously Released Defendant Arrested in Different District

Judge Dever reported that the Advisory Committee received two proposals to clarify the procedures in Rule 40. Rule 40 relates to procedure on arrest of a person on a warrant issued in another district for failure to appear or violation of conditions of release. Judge Dever stated that the consensus of the Rule 40 subcommittee is that the rule can be clarified, and the Advisory Committee will likely take up a proposal on rule amendments at its fall 2025 meeting.

4. JOINT COMMITTEE BUSINESS

A. Report on Electronic Filing by Self-Represented Litigants

Professor Struve referred to her memorandum in the agenda book beginning on page 456 relating to the project on electronic filing and service by self-represented litigants.

B. Report of Subcommittee on Attorney Admission

Professor Struve reported that the subcommittee on attorney admission is also at work on further research.

C. Report on Privacy Issues

Ms. Dubay provided a brief report on the joint project to develop uniform rules on complete redaction of social security numbers and use of pseudonyms in cases involving minors, noting that she would be continuing this project.

5. OTHER COMMITTEE BUSINESS

A. Tribute to Judge Bates

Earlier in the meeting, Professor Struve and Ms. Dubay took a moment to offer thanks to Judge Bates on behalf of the Rules Committees, the Rules Committee Staff, and the Reporters, past and present, for his service as Chair of the Standing Committee, which concludes on September 30, 2025. Professor Coquillette also offered a thoughtful tribute to Judge Bates. Professor Struve read letters of appreciation to Judge Bates from Judge Jeffrey Sutton, Judge David Campbell, and Judge Robert Dow, all former Chairs of Rules Committees. Professor Struve also presented a token of appreciation from the Rules Committee community to Judge Bates in the form of a personalized baseball card noting statistics of the rule amendments undertaken in his tenure.

Following these thanks and tributes, Judge Bates offered brief remarks, noting that it was his privilege to work with everyone and their predecessors as part of the team that makes the rules process work extremely well.

B. Status of Rule Amendments

Ms. Dubay reported that the latest set of proposed rule amendments was transmitted to Congress on April 23, 2025. A list of the rule amendments is included in the agenda book beginning on page 461.

C. Legislative Update

Mr. Brinker, the Rules Law Clerk, provided a legislative update. The legislation tracking chart begins on page 477 of the agenda book. Mr. Brinker noted that no bills identified in the agenda book had received legislative action since being introduced. Ms. Dubay also noted in response to a judge member's question that the Rules Committee Staff monitors only those bills that would directly or effectively amend the rules of practice and procedure.

D. FJC Update

Dr. Reagan indicated that he would rely on the FJC report in the agenda book. Judge Dever remarked that it would be helpful for the FJC to continue educating judges that when rules change, they should not rely on case law interpreting the former rule.

6. CONCLUDING REMARKS AND ADJOURNMENT

Judge Dever noted the upcoming departure of Mr. Brinker as his term as Rules Law Clerk comes to an end, thanked him for his excellent work, and wished him well in his new employment. Judge Dever also recognized Judge Rosenberg for her upcoming role as FJC Director and wished her well.

Judge Dever concluded by thanking the Standing Committee members for their hard work and adjourned the meeting.

APPENDIX

Summary of Standing Committee Revisions to Final Amendments

The following list identifies revisions made at the Standing Committee meeting to amendments presented for final approval, as set forth in the agenda book available on the [uscourts.gov website](https://uscourts.gov).

Evidence Rule 801(d)(1)(A)

The proposed amendments to Evidence Rule 801(d)(1)(A) begin on page 64 of the agenda book. There were no revisions to the rule text. Prior to discussion by the Standing Committee, the Chair noted one correction to the committee note:

1. Page 65, line 32, “exception” was changed to “objection.”

The Standing Committee discussed and approved one additional change:

1. Page 66, line 52, “proving” was changed to “assessing.”

Appellate Rule 29

The proposed amendments to Appellate Rule 29 begin on page 112 of the agenda book. The Reporter noted the following corrections to the committee note:

1. Page 123, line 234, “Rule 29(a)(4)(D)” was changed to “Rule 29(a)(4).”
2. Page 124, line 238, “curiae” was deleted.
3. Page 124, line 245, “Rule 29(a)(4)(E)” was changed to “Rule 29(a)(4)(F).”
4. Page 125, line 293, “Rule 29(a)(4)(D)(iii)” was changed to “Rule 29(a)(4)(E)(iii).”
5. Page 127, line 347, “Rule 29(a)(4)(E)” was changed to “Rule 29(a)(4)(F).”
6. Page 127, line 350, “Rule 29(a)(4)(D)” was changed to “Rule 29(a)(4)(E).”

The Standing Committee then discussed and approved one change to the rule text in proposed Rule 29(a)(7):

1. Page 118, lines 105-106, “An amicus may file a reply brief only with the court’s permission” was changed to “An amicus may not file a reply brief except with the court’s permission.”

Bankruptcy Rule 9014

The proposed amendments to Bankruptcy Rule 9014 begin on page 246 of the agenda book. There were no revisions to the rule text. The Standing Committee discussed and approved one change to the committee note:

1. Page 247, lines 26-27, “That rule is no longer generally applicable in a bankruptcy case, and” was deleted so that the second sentence reads “The reference to that rule has been removed from Rule 9017.”

Bankruptcy Rule 2007.1(b)(3)(B)

The proposed technical amendments to Bankruptcy Rule 2007.1(b)(3)(B) begin on page 221 of the agenda book. There were no revisions to the rule text. The Standing Committee indicated that conforming technical changes also needed to be made to Rule 2007.1(c)(1) and (3) and the committee note. Those sections of Rule 2007.1 and the committee note were not contained in the agenda book, but the conforming technical amendments to delete the romanettes were approved.

Draft

SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 29 and 32, the Appendix on Length Limits, and Form 4, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp. 2-5
2.
 - a. Approve the proposed amendments to Bankruptcy Rules 1007, 2007.1, 3001, 3018, 5009, 9006, 9014, 9017, and new Rule 7043, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;
 - b. Approve, effective December 1, 2025, the proposed amendment to Official Form 410S1, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date pp. 5-9
3. Approve the proposed amendments to Evidence Rule 801 as set forth in Appendix C and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp. 14-16

The remainder of the report is submitted for the record and includes the following items for the information of the Judicial Conference:

- Federal Rules of Civil Procedure pp. 9-11
- Federal Rules of Criminal Procedure pp. 11-13
- Judiciary Strategic Planning p. 16

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REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 10, 2025. All members participated. Representing the advisory committees were Judge Allison H. Eid (10th Cir.), chair; and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly (Bankr. W.D. Va.), chair; Professor S. Elizabeth Gibson, Reporter; and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg (S.D. Fla.), chair; Professor Richard L. Marcus, Reporter Professor Andrew Bradt, Associate Reporter; and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III (E.D.N.C.), chair; Professor Sara Sun Beale, Reporter; and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Jesse M. Furman (S.D.N.Y.), chair; and Professor Daniel Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, Reporter to the Standing Committee; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee, and; Carolyn A. Dubay, Secretary to the Standing Committee; Bridget M. Healy and Scott Myers, Rules Committee Staff Counsel; Kyle Brinker, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan,

NOTICE NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.
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Senior Research Associate, Federal Judicial Center; and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, on behalf of the Deputy Attorney General.

In addition to its general business, including a review of pending rule amendments in different stages of the Rules Enabling Act¹ process and an update on pending legislation potentially affecting the rules, the Standing Committee received and responded to reports from its five advisory committees. The Committee also received brief updates on the work of the Standing Committee's subcommittee concerning attorney admissions and on two joint projects among the Bankruptcy, Civil, Criminal, and Appellate Rules Committees—one on electronic filing and service by self-represented litigants and one on privacy issues relating to Social Security numbers (SSNs) and the use of a minor's initials in public court filings. The Committee members were also advised to submit any comments on the draft updated *Strategic Plan for the Federal Judiciary (Strategic Plan)* to the Judiciary Planning Coordinator, Chief Judge Michael A. Chagares (3d. Cir.), who also attended the relevant portion of the meeting.

FEDERAL RULES OF APPELLATE PROCEDURE

Amended Rules and Form Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rule 29 relating to amicus briefs, along with conforming amendments to Rule 32(g) and the Appendix on Length Limits. The Advisory Committee also recommended for final approval amendments to Form 4, the form used by applicants for *in forma pauperis* (IFP) status in appellate proceedings. The Standing Committee unanimously approved the Advisory Committee's recommendations after rephrasing proposed changes to

¹Please refer to [Laws and Procedures Governing Work of the Rules Committees](#) for more information.

Rule 29(a)(7) (“Reply brief”) to shift the provision’s emphasis (without changing its substance) to more closely resemble the current language in Rule 29(a)(7), as well as approving technical corrections in the committee note to Rule 29.

Rule 29 (Brief of an Amicus Curiae)

The proposed amendments to Rule 29 address several issues with respect to the contents of amicus briefs, particularly as to required disclosures of relationships between the amicus and parties or nonparties. In particular, the amendments require disclosure of whether a party and/or its counsel have a majority ownership interest in or majority control of an amicus. In addition, whereas the current rule requires disclosure of whether any nonparty (other than the amicus, its members, or its counsel) contributed money intended to fund preparation or submission of the brief, the proposed amendments limit this disclosure requirement to instances in which the amount contributed or pledged to be contributed is greater than \$100. The proposed amendments also add a broader disclosure concerning the background of the amicus—to include the identity, history, experience, and interest of the amicus, as well as the date of its creation if it has existed for less than 12 months. Finally, the proposed amendments impose an express word limit of 6,500 words on amicus briefs at the initial stage rather than reference to “one-half the maximum length authorized . . . for a party’s principal brief.”

The approved amendments to Rule 29 reflect several changes to the preliminary draft after public comment and a public hearing on the proposed amendments. Among other changes, the Advisory Committee at its spring meeting removed proposed language that would have eliminated the option for filing an amicus brief based on the parties’ consent (and would therefore have required a motion for leave to file a brief) and removed proposed language that would have required disclosure of whether parties and/or their counsel had contributed 25 percent or more of the amicus’s revenue for the prior fiscal year. The Advisory Committee

also revised the statement concerning the purpose of amicus briefs to more closely track the similar statement in Supreme Court Rule 37.

Rule 32 (Form of Briefs, Appendices, and Other Papers) and Appendix of Length Limits

The proposed amendment to Rule 32 conforms Rule 32(g)'s cross-references to the updated sections of amended Rule 29. Similarly, the proposed amendments to the Appendix of Length Limits conform the length limits for amicus briefs identified in the Appendix to the proposed amendment to Rule 29.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal IFP)

The proposed amendments to Form 4 are intended to reduce the burden on individuals seeking IFP status by (among other things) reducing the amount of personal financial detail required to be provided, while retaining information that a court of appeals needs when deciding whether to grant IFP status.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 29 and 32, the Appendix on Length Limits, and Form 4, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed Rule Amendment Approved for Publication and Public Comment

The Advisory Committee on Appellate Rules also recommended that a proposed amendment to Rule 15 be published for public comment in August 2025. After minor revisions to the proposed amendment to explain a term in greater detail, the Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 15 (Review or Enforcement of an Agency Order—How Obtained; Intervention)

The proposed amendment to Rule 15 addresses issues that may arise when a petition for review or enforcement of an agency decision is filed prematurely—i.e., before the agency has disposed of a motion for reconsideration that renders the agency decision nonreviewable as to the

petitioner. In circuits that apply the “incurably premature” doctrine, if a pending motion to reconsider an agency decision makes the decision unreviewable in the court of appeals, then a new petition to review that agency decision must be filed in the court of appeals once the agency decision becomes final. The proposed amendments to Rule 15 would eliminate the need to refile the petition and provides that the original petition for review becomes effective upon the agency’s disposition of the last reconsideration request. This change would align Rule 15 with Rule 4(a)(4)(B)(i), which relates to the effectiveness of a notice of appeal filed after a judgment is entered or announced in the district court, but before the district court disposes of certain post-judgment motions authorized under the Federal Rules of Civil Procedure.

Information Items

The Advisory Committee on Appellate Rules at its April 2, 2025, meeting also discussed a possible new rule regarding intervention on appeal, as well as possible amendments to Rule 8 (Stay or Injunction Pending Appeal) regarding administrative stays. It preliminarily discussed a suggestion regarding reopening the time to appeal under Rule 4 (Appeal as of Right—When Taken), but decided to hold that item until the decision of a case then pending in the Supreme Court.² The Advisory Committee also removed from consideration a suggestion that Rule 26 (Computing and Extending Time) be amended to not count weekends in computing time periods.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Amended Rules and Form and New Rule Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval one new rule, amendments to eight rules, and amendments to one official form: (1) amendments to Rule 3018; (2) amendments to Rules 9014 and 9017, and new Rule 7043; (3) amendments to

²See *Parrish v. United States*, No. 24-275, 2025 WL 1657416, at *2 (U.S. June 12, 2025).

Rules 1007, 5009, and 9006; (4) amendments to Official Form 410S1; and (5) technical corrections to Rules 2007.1 and 3001. After a technical correction to Rule 2007.1(c) to conform to the technical correction to Rule 2007.1(b), and a minor revision to the committee note for Rule 9014 shortening the discussion of the amendment to Rule 9017, the Standing Committee unanimously approved the Advisory Committee’s recommendations.

Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan)

Whereas current Rule 3018(c) requires that acceptance or rejection of a plan in a chapter 9 or 11 case be in writing, the proposed amendment to the rule authorizes a court to additionally treat as an acceptance of a plan a statement on the record by a creditor or the creditor’s attorney or authorized agent. A conforming amendment is also made to subdivision (a). In response to a public comment, the Advisory Committee made minor changes at its spring meeting to clarify that Rule 3018(c)’s statement-on-the-record provision applies to individual creditors (who may be self-represented) as well as to a creditor’s attorney or agent.

Rules 9014 (Contested Matters) and 9017 (Evidence) and new Rule 7043 (Taking Testimony)

The proposed amendments (1) amend Rule 9017 to eliminate the general applicability of Fed. R. Civ. P. 43 (Taking Testimony) to all bankruptcy cases; (2) add new Rule 7043 (Taking Testimony), which will retain the applicability of Fed. R. Civ. P. 43 to adversary proceedings (thereby continuing to authorize remote witness testimony in adversary proceedings “for good cause in compelling circumstances and with appropriate safeguards”); and (3) amend Rule 9014 to allow a court in a contested matter to permit remote witness testimony “for cause and with appropriate safeguards” (i.e., eliminating the requirement of “compelling circumstances”). The changes are intended to provide bankruptcy courts greater flexibility to authorize remote testimony in contested matters (vs. adversary proceedings), which usually can be resolved less formally and more expeditiously by means of a hearing, often on the basis of uncontested

testimony. After public comment, the Advisory Committee revised the proposed amendment to Rule 9014 to clarify that all testimony in a contested matter would be governed by the rule, not just testimony provided on motions.

Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions)

Proposed amendments to Rules 1007(c), 5009(b), and 9006(b) and (c) are intended to reduce the number of individual debtors whose cases are closed without a discharge because they either failed to take the required course on personal financial management or merely failed to file the needed documentation upon completion of the course. The proposed amendments to Rule 1007 eliminate the deadlines for filing the certificate of course completion, while conforming changes to Rule 9006 eliminate provisions concerning court alteration of those deadlines. The proposed amendment to Rule 5009 provides for two notices (instead of just one) reminding the debtor of the need to take the course and to file the certificate of completion.

Official Form 410S1 (Notice of Mortgage Payment Change)

The proposed amendment to Official Form 410S1 reflects the pending December 1, 2025 changes to Rule 3002.1(b) regarding ongoing payment adjustments to a home equity line of credit (HELOC) over the course of a bankruptcy case. The amended form accommodates amended Rule 3002.1(b)'s new option allowing the holder of a claim under a HELOC agreement to provide an annual notice of payment change (with a reconciliation amount) instead of notices throughout the year each time there is a change.

Rules 2007.1 (Appointing a Trustee or Examiner in a Chapter 11 Case) and 3001 (Proof of Claim)

Technical corrections are required to fix erroneous references in two rules inadvertently made during the restyling of the Bankruptcy Rules. First, the proposed technical amendments to Rule 2007.1(b) and (c) revise references to a numbered list that was restyled as a bulleted list.

Second, the proposed technical amendment to Rule 3001 provides that subdivision (c)’s provision concerning sanctions in an individual-debtor case applies if “a claim holder fails to provide any information required by (c)” (rather than “by (1) or (2)”) so as to ensure that the sanctions provision applies to all information required by subdivision (c) (consistent with the pre-restyling version of the rule). Additionally, the proposed technical amendments to Rule 3001(c) reverse the order of what had been paragraphs (c)(3) and (c)(4) so that the sanctions provision (which will become (c)(4)) follows all of the substantive provisions that it enforces. The amendments also make a conforming change to a cross-reference in subdivision (c)(1).

Recommendation: That the Judicial Conference:

- a. Approve the proposed amendments to Bankruptcy Rules 1007, 2007.1, 3001, 3018, 5009, 9006, 9014, 9017, and new Rule 7043, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and
- b. Approve, effective December 1, 2025, the proposed amendment to Official Form 410S1, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Proposed Amendments to Form Approved for Publication and Public Comment

The Advisory Committee on Bankruptcy Rules also recommended that proposed amendments to Official Form 106C be published for public comment in August 2025. The Standing Committee unanimously approved the Advisory Committee’s recommendation.

Official Form 106C (Schedule C: The Property You Claim as Exempt)

The proposed amendments to Form 106C would provide totals for two columns: (1) the specific dollar amounts for each exemption and (2) the value of the debtor’s interest in property for which the debtor claims exemptions.

Information Items

The Advisory Committee on Bankruptcy Rules at its April 3, 2025, meeting also discussed suggestions to allow special masters to be used in bankruptcy matters and decided to withdraw a proposed amendment to Rule 1007(h) (Interests in Property Acquired or Arising After the Petition is Filed) that was published for public comment in August 2024. The proposed amendment to Rule 1007(h) would have given a court authority to require the debtor to file a supplemental schedule listing certain property or income that becomes estate property after the case is filed. After considering public comments on the proposal, the Advisory Committee decided not to proceed with it.

FEDERAL RULES OF CIVIL PROCEDURE

Proposed Rule Amendments Approved for Publication and Public Comment

The Advisory Committee on Civil Rules recommended that proposed amendments to Rules 7.1, 26, 41, and 45 be published for public comment in August 2025. After minor revisions to the proposed amendment to Rules 45(b) and 41(a), and minor revisions to the amended committee notes for Rules 45(c), 26, and 41(a), the Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 7.1 (Disclosure Statement)

The proposed amendment to the disclosures required under Rule 7.1(a)(1) requires any party or would-be intervenor that is a private business organization to disclose any publicly held business organization that “directly or indirectly” owns 10 percent or more of the party or intervenor. The proposal responds to concerns raised that the current rule, which requires disclosure only of “any parent corporation and any publicly held corporation owning 10 percent or more of its stock,” may result in nondisclosure of a “grandparent” corporation. This change is intended to assist judges in evaluating if recusal is appropriate consistent with updated guidance

in Committee on Codes of Conduct Advisory Opinion No. 57, which explains that corporate ownership of at least 10 percent of a party creates a rebuttable presumption of parental control and that a judge must recuse if they “conclude that a party is controlled by a corporation in which the judge owns stock.” Another change substitutes the term “business organization” for the word “corporation” to clarify that the disclosure requirement applies to different forms of business entities.

Rule 41 (Dismissal of Actions)

The proposed amendments to Rule 41 clarify that a plaintiff may obtain a voluntary dismissal of one or more claims raised in a complaint without dismissing the entire action. This change responds to decisions in some courts interpreting the current language to mean that only an entire case, i.e., all claims against all defendants, or only all claims against one or more defendants, could be dismissed under the rule. The proposed amendments also provide that a stipulation of dismissal need be signed only by parties who remain in the action at the time of the dismissal.

Rule 45(b) (Subpoena – Service)

The proposed amendment to Rule 45(b) clarifies how a subpoena for testimony may be served and whether the witness fee must be tendered simultaneously with service. The proposed amendment borrows two methods of service from Rule 4(e)(2)’s methods for serving a complaint on an individual—personal service or leaving a copy at the individual’s dwelling or usual place of abode with someone of suitable age and discretion who resides there. The proposed amendment also adds an additional method of service through the mail or commercial carrier if confirmation of actual receipt can be provided, and further authorizes the court to approve another means of service for good cause. The proposed amendment also includes two other changes: (1) relaxing the current requirement that witness fees be tendered at the time of service, and (2) providing a

14-day notice period (subject to shortening by the court for good cause) when the subpoena requires attendance at a trial, hearing, or deposition.

Rule 45(c) (Subpoena – Remote Testimony)

The proposed amendment to Rule 45(c) adds a new subsection (c)(2) to address subpoenas for remote trial testimony. The proposed new subsection clarifies that the “place of attendance for remote testimony is the location where the person is commanded to appear in person.” Under new Rule 45(c)(2), the court’s subpoena power for in-court remote testimony extends nationwide so long as the subpoena does not command the witness to travel farther than the distance authorized under Rule 45(c)(1). The proposed amendment does not affect the standards governing whether to permit in-court remote testimony.

Rule 26 (Duty to Disclose; General Provisions Governing Discovery)

The proposed amendment to Rule 26(a) relating to pretrial disclosures requires disclosure of the party’s expectation as to whether each of its witnesses’ testimony will be in-person or remote.

Information Items

The Advisory Committee on Civil Rules at its April 1, 2025 meeting discussed various information items, including potential rule amendments regarding sealed filings and default judgments. The Advisory Committee also heard updates relating to items concerning third-party litigation funding, cross-border discovery, remote testimony, and random case assignment.

FEDERAL RULES OF CRIMINAL PROCEDURE

Proposed Rule Amendment Approved for Publication and Public Comment

The Advisory Committee on Criminal Rules recommended that proposed amendments to Rule 17 (Subpoena) be published for public comment in August 2025. After minor revisions to

the proposed amendment, the Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 17 (Subpoena)

The proposed amendments focus primarily on Rule 17(c), which governs subpoenas for production. The proposed amendments clarify that third-party subpoenas for production may be issued for proceedings in addition to trial. This includes proceedings where such subpoenas are most likely to be needed or are already used regularly in many districts, as well as proceedings for which there is statutory or rule authority for parties to present evidence (i.e., detention, revocation, suppression, and sentencing). With the court's permission, the rule also authorizes such subpoenas for other evidentiary hearings.

The proposed amendments also set forth a modified version of the test announced in *Nixon v. United States*, 418 U.S. 683 (1974), as the standard for the issuance of third-party subpoenas for production. The modified test as proposed is intended to provide both prosecution and defense with an adequate and more uniform opportunity across jurisdictions to obtain needed evidence from third parties.

Other proposed amendments to Rule 17 clarify when a party must file a motion to serve a subpoena for production of documents—when the subpoena requests personal or confidential information about a victim, when the subpoena is requested by a self-represented party, or when a local rule or court order requires a motion. When no motion is required, a party may serve a subpoena for production on an ex parte basis. When a motion is required, the proposed amendments provide that the court “must” allow a party to file it ex parte if good cause is shown. The proposed amendments further address ex parte subpoena practice—setting a default rule that a party need not disclose its subpoena to another party if no motion is required.

The proposed amendments also clarify the circumstances under which the recipient of the subpoena must produce the designated items to the court rather than directly to the requesting party.

In addition, the amendments address the disclosure of material produced directly to the requesting party, disapproving the practice in some courts in which all subpoenaed items must be provided to the opposing party, regardless of whether the items would be subject to discovery under Rule 16. By providing that a party must disclose to its opponent only items the party obtains by subpoena if the item is otherwise discoverable, the proposed amendments seek to ensure that Rule 17 is not interpreted to disturb policies codified in Rule 16 and other discovery rules regulating disclosure between the parties.

Finally, the proposed amendments clarify, as to each subdivision of Rule 17, whether it applies to subpoenas for testimony, subpoenas for production, or both.

Information Items

The Advisory Committee on Criminal Rules at its meeting on April 24, 2025, also discussed several information items. The Advisory Committee was updated on a subcommittee's work on a possible amendment to Rule 49.1 (Privacy Protection for Filings Made with the Court) to require the use of pseudonyms for minors and the complete redaction of SSNs. The Advisory Committee also heard an update on a potential amendment to Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District) that would address instances when a previously released defendant is arrested in one district under a warrant issued in another.

FEDERAL RULES OF EVIDENCE

Amended Rule Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules recommended for final approval amendments to Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay).

The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay)

Current Rule 801(d)(1)(A) excludes from the definition of hearsay a declarant-witness's prior inconsistent statements only if the witness gave the prior statement under penalty of perjury in a prior proceeding or deposition. The proposed amendment to Rule 801 eliminates the requirement that the prior inconsistent statement be offered under penalty of perjury and allows any prior inconsistent statement by a declarant-witness to be admissible as substantive evidence, subject to exclusion under Rule 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons). This proposed amendment conforms Rule 801(d)(1)(A)'s approach to that taken in Rule 801(d)(1)(B) for prior consistent statements and eliminates potential confusion from limiting instructions.

The committee note was revised after publication and public comment to underscore the amended rule's parallel treatment of prior consistent and inconsistent statements and to emphasize that the rule governs admissibility rather than sufficiency of the evidence.

Recommendation: That the Judicial Conference approve the proposed amendments to Evidence Rule 801 as set forth in Appendix C and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed Rule Amendment and New Rule Approved for Publication and Public Comment

The Advisory Committee on Evidence Rules recommended that a proposed amendment to Rule 609 (Impeachment by Evidence of a Criminal Conviction) and a new Rule 707 (Machine-Generated Evidence) be published for public comment in August 2025.

After minor revisions to the text and committee note of each rule, the Standing Committee unanimously approved the Advisory Committee’s recommendation concerning Rule 609 and approved (with one member objecting) the recommendation concerning Rule 707.

Rule 609 (Impeachment by Evidence of a Criminal Conviction)

The proposed amendment to Rule 609(a)(1)(B) addresses the standard under which evidence of prior convictions not based on falsity may be introduced to attack a testifying criminal defendant’s character for truthfulness. Under the proposed amendment, evidence of a non-falsity based prior conviction is not admissible to impeach a criminal defendant unless its probative value “substantially” outweighs the risk of unfair prejudice to the defendant. Under current Rule 609, such evidence must be admitted against a testifying criminal defendant if the probative value merely outweighs its prejudicial effect. With this amendment, the Advisory Committee aims to reduce the risk that Rule 609 will unduly deter criminal defendants from exercising their right to testify. An additional proposed amendment to Rule 609(b) clarifies the time period for older convictions that are subject to a more exclusionary standard. Under the amendment, the 10-year time period for the rule’s applicability is measured from the date of conviction or end of confinement, whichever is later, until the date of trial.

New Rule 707 (Machine-Generated Evidence)

The Advisory Committee spent three years considering whether the Evidence Rules sufficiently regulate the reliability and authenticity of evidence created by artificial intelligence (AI). Proposed new Rule 707 sets standards for the admissibility of machine-generated evidence that would be subject to Rule 702’s expert-testimony requirements if testified to by a witness.

Information Items

The Advisory Committee on Evidence Rules also discussed at its meeting on May 2, 2025, several other issues. This included discussion of a possible new subdivision for Rule 901 (Authenticating or Identifying Evidence) that would set a framework for evaluating contentions that an item of evidence has been fabricated using generative AI (deepfakes). The Advisory Committee also continues its consideration of a suggestion that Rule 902(1) (Evidence That Is Self-Authenticating; Domestic Public Documents That Are Sealed and Signed) be amended to add federally-recognized Indian tribes to the list of entities whose sealed and signed documents are self-authenticating.

JUDICIARY STRATEGIC PLANNING

As noted above, the Committee was asked to provide input on the draft 2025 *Strategic Plan*. The Committee indicated that it had no suggested edits in a letter to Chief Judge Chagares dated June 30, 2025.

Respectfully submitted,



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* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2025, unless otherwise noted

Current Step in REA Process:

- Transmitted to Congress (Apr 2025)

REA History:

- Transmitted to Supreme Court (Oct 2024)
- Approved by Standing Committee (June 2024 unless otherwise noted)
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2021. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule's provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(i) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule.	
BK 8006	The proposed amendments to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.	AP 6
Official Form 410	The proposed amendments would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. The amended form went into effect December 1, 2024.	

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REA History:

- Transmitted to Supreme Court (Oct 2024)
- Approved by Standing Committee (June 2024 unless otherwise noted)
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the “privilege log” problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)’s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the “privilege log” problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)’s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Approved by Standing Committee (June 2025 unless otherwise noted)

REA History:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 29	The proposed amendments to Rule 29 relate to amicus curiae briefs. The proposed amendments, among other things, would amend Rule 29(a) relating to amicus filings during a court’s initial consideration of a case into renumbered Rule 29(a)-(e) and expand the disclosure obligations. Rule 29(f) (formerly Rule 29(b)) would relate to amicus filings during the rehearing stage. The length limit for amicus briefs at the initial stage as set forth in Rule 29(a)(5) would be amended to set a specific word limit of 6,500 words.	Rule 32; Appendix
AP 32	The proposed amendments to Rule 32 would conform to the proposed amendments to Rule 29.	Rule 29
AP Appendix	The proposed amendments to the Appendix would conform to the proposed amendments to Rule 29.	Rule 29
AP Form 4	The proposed amendments to Form 4 would simplify Form 4, with the goal of reducing the burden on individuals seeking in forma pauperis status (IFP) while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.	
BK 1007	The proposed amendments to Rule 1007(c)(4) eliminate the deadlines for filing certificates of completion of a course in personal financial management. The proposed amendments to Rule 1007(h) clarify that a court may require a debtor to file a supplemental schedule to report postpetition property or income that comes into the estate under § 115, 1207, or 1306 of the Bankruptcy Code.	
BK 3018	The proposed amendments to subdivision (c) would allow for more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case.	
BK 5009	The proposed amendments to Rule 5009(b) would provide an additional reminder notice to the debtors that the case may be closed without a discharge if the debtor’s certificate of completion of a personal financial management course has not been filed.	
BK 9006	The proposed amendments conform to the proposed amendments to Rule 1007.	
BK 9014	The proposed amendments to Rule 9014(d) relaxes the standard for allowing remote testimony in contested matters to “cause and with appropriate safeguards.” The current standard, imported from the trial standard in Civil Rule 43(a), which is applicable across bankruptcy (in both contested matters and adversary proceedings) is cause “in compelling circumstances and with appropriate safeguards.”	
BK 9017	The proposed amendments to Rule 9017 removes the reference to Civil Rule 43 leaving the proposed amendment to Rule 9014(d) to govern the standard for	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Approved by Standing Committee (June 2025 unless otherwise noted)

REA History:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	allowing remote testimony in contested matters, and Rule 7043 to govern the standard for allowing remote testimony in adversary proceedings.	
BK 7043	Rule 7043 is new and works with proposed amendments to Rules 9014 and 9017. It would make Civil Rule 43 applicable to adversary proceedings (though not to contested matters)	
BK Official Form 410S1	The proposed changes would conform the form the pending amendments to Rule 3002.1 that are on track to go into effect on December 1, 2025 , and would go into effect on the same date as the rule change.	
EV 801	The proposed amendments to Rule 801(d)(1)(A) would provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403.	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2027

Current Step in REA Process:

- Published for public comment (Aug 2025 – Feb 2026 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 15	The proposed amendment to Rule 15 would remove a potential trap for the unwary in the current rule. The proposed amendment reflects the party-specific nature of appellate review of administrative decisions and would require a party that wants to challenge the result of agency reconsideration to file a new or amended petition.	
BK 2002	The proposed amendment to Rule 2002(o) would provide that the caption of a notice given under Rule 2002 must include the information that Official Form 416B requires.	
BK Official Form 101	The proposed amendment to Question 4 in Part 1 of Form 101 would modify the language to read: “EIN (Employer Identification Number) issued to you, if any. Do NOT list the EIN of any separate legal entity such as your employer, a corporation, partnership, or LLC that is not filing this petition.”	
BK Official Form 106C	The proposed amendments would amend Form 106C to provide a total of the specific-dollar exemption amounts along with the addition of a space on the form for the total value of the debtor’s interest in property for which exemptions are claimed.	
CR 17	The proposed amendments to Rule 17 relate to third-party subpoenas for documents and other items and address seven areas: application to proceedings other than trial; the standard for when such subpoenas are available; when a motion and order are required; when a party may make its request ex parte; the place of production; the preservation of Rule 16’s disclosure policies; and which subparts of Rule 17 apply to different proceedings.	
CV 7.1	The proposed amendments to Rule 7.1(a) substitute “business organization” for the term “corporation” and require disclosure of business organizations that “directly or indirectly own 10% or more of” a party rather than disclosure based on ownership of “stock” in a party.	
CV 26	The proposed amendment to Rule 26 adds a pretrial disclosure requirement for parties to state whether any witness they expect to present at trial will testify in person or remotely.	Rule 45(c)
CV 41	The proposed amendments to Rule 41(a) would clarify that: (1) the rule permits the dismissal of one or more claims in an action rather than only allowing dismissal of the entire action; (2) only the signatures of active parties who remain in a case are required to sign a stipulation of dismissal.	
CV 45	The proposed amendments to Rule 45 include amendments to Rule 45(b) relating to service of subpoenas and Rule 45(c) relating to subpoenas for remote testimony. There is a correlating proposed amendment to Rule 26 relating to	Rule 26

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2027

Current Step in REA Process:

- Published for public comment (Aug 2025 – Feb 2026 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	pretrial disclosures as to whether testimony at trial will be offered in person or by remote means. The proposed amendments to Rule 45(b) specify that the methods for service of a subpoena are personal delivery, leaving it at the person’s abode with someone of suitable age and discretion who resides there, sending it by mail or commercial carrier if it includes confirmation of receipt, or another method authorized by the court for good cause. The amendment would also add a default 14-day notice period and provide that the tender of witness fees is not required to effect service of the subpoena so long as the fees are tendered upon the witness’s appearance. The proposed amendments to Rule 45(c) adds a “place of compliance” for subpoenas for remote testimony and specifies that it is “the location where the person is commanded to appear in person.”	
CV 81	The proposed amendment to Rule 81(c) clarifies whether and when a jury demand must be made after removal and makes clear that Rule 38 applies to removed cases. The proposed amendment also removes the prior exemption from the jury demand requirement in cases removed from state courts in which an express demand for a jury trial is not required.	
EV 609	There are two proposed amendments to Rule 609. First, the proposed amendment to Rule 609(a)(1)(B) clarifies the standard under which evidence of prior convictions not based on falsity may be introduced to attack a testifying criminal defendant’s character for truthfulness by adding “substantially” before the word “outweighs.” Second, the proposed amendment to Rule 609(b) clarifies that the 10-year time-period for the rule’s applicability is measured from the date of conviction or end of confinement, whichever is later, until the “date that the trial begins.”	
EV 707	Proposed new Rule 707 provides that if machine-generated evidence is introduced without an expert witness, and it would be considered expert testimony if presented by a witness, then the standards of Rule 702(a)-(d) are applicable to that output. The proposed rule further provides that it does not apply to the output of simple scientific instruments.	

Legislation That Directly or Effectively Amends the Federal Rules
119th Congress
(January 3, 2025–January 3, 2027)

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Protecting Our Democracy Act	<u>S. 2838</u> <i>Sponsor:</i> Schiff (D-CA) <i>Cosponsors:</i> <u>8 Democratic Cosponsors</u>	CV – New Rule(s)	Most Recent Bill Text: https://www.congress.gov/119/bills/s2838/BILLS-119s2838is.pdf Summary: Would require the Judicial Conference to create rules of procedure to ensure expeditious treatment of civil actions brought by Congress to enforce compliance with a subpoena.	9/17/2025: S. 2838 introduced in Senate; referred to Committee on Homeland Security and Governmental Affairs
Lawsuit Abuse Reduction Act of 2025	<u>H.R. 5258</u> <i>Sponsor:</i> Collins (R-GA) <i>Cosponsors:</i> Gill (R-TX) Tiffany (R-WI) Hageman (R-WY)	CV 11	Most Recent Bill Text: https://www.congress.gov/119/bills/hr5258/BILLS-119hr5258ih.pdf Summary: Would amend Civil Rule 11 to require the court to issue sanctions for Rule 11 violations, which shall consist of an order to pay the amount of the reasonable expenses incurred as a direct result of the violation.	9/10/2025: H.R. 5258 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection Act of 2025	<u>H.R. 4678</u> <i>Sponsor:</i> Johnson (D-GA) <i>Cosponsors:</i> <u>20 Democratic cosponsors</u>	EV 416	Most Recent Bill Text: https://www.congress.gov/119/bills/hr4678/BILLS-119hr4678ih.pdf Summary: Would create a new Evidence Rule (416, Limitation on Admissibility of Defendant's Creative or Artistic Expression) that would make a defendant's creative or artistic expression inadmissible unless the government proves by clear and convincing evidence that one of several exceptions applies.	7/23/2025: H.R. 4678 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Rape Shield Enhancement Act of 2025	<u>H.R. 3596</u> <i>Sponsor:</i> Mace (R-SC)	EV 412; CV 26; CR 16	Most Recent Bill Text: <u>https://www.congress.gov/119/bills/hr3596/BILLS-119hr3596ih.pdf</u> Summary: Would require the Judicial Conference to submit to Congress reports reviewing Evidence Rule 412, Civil Rule 26, and Criminal Rule 16. Would also require the Judicial Conference to identify potential rules amendments that further limit the admissibility of or scope of discovery regarding information of an alleged sexual assault victim and that increase privacy protections for sexual assault victims.	5/23/2025: H.R. 3596 introduced in House; referred to Judiciary Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2025	<u>S. 1814</u> <i>Sponsor:</i> Whitehouse (D-RI) <i>Cosponsors:</i> <u>26 Democratic and Independent cosponsors</u>	AP 29	Most Recent Bill Text: <u>https://www.congress.gov/119/bills/s1814/BILLS-119s1814is.pdf</u> Summary: Would require the Judicial Conference to prescribe rules of procedure requiring certain amicus disclosures and for prohibiting the filing of or striking an amicus brief that would result in the justice, judge, or magistrate judge's disqualification.	5/20/2025: S. 1814 introduced in Senate; referred to Judiciary Committee
Protecting Our Courts from Foreign Manipulation Act of 2025	<u>H.R. 2675</u> <i>Sponsor:</i> Cline (R-VA)	CV 26	Most Recent Bill Text: <u>https://www.congress.gov/119/bills/hr2675/BILLS-119hr2675ih.pdf</u> Summary: Would require additional disclosures under Civil Rule 26(a) for any non-party foreign person, foreign state, or sovereign wealth fund that has a right to receive payment that is contingent on the outcome of a civil action. Would also prohibit third-party litigation funding by foreign states and sovereign wealth funds.	4/7/2025: H.R. 2675 introduced in House; referred to Judiciary Committee
Sunshine in the Courtroom Act of 2025	<u>S. 1133</u> <i>Sponsor:</i> Grassley (R-IA) <i>Cosponsors:</i> Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	Most Recent Bill Text: <u>https://www.congress.gov/119/bills/s1133/BILLS-119s1133is.pdf</u> Summary: Would permit court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.	3/26/2025: Introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Trafficking Survivors Relief Act of 2025	<u>H.R. 1379</u> <i>Sponsor:</i> Fry (R-SC) <i>Cosponsors:</i> <u>15 bipartisan cosponsors</u>	CR 29	Most Recent Bill Text: https://www.congress.gov/119/bills/hr1379/BILLS-119hr1379ih.pdf Summary: Would permit a person convicted of certain federal offenses as a result of having been a victim of trafficking to move the convicting court to vacate the judgment of conviction, to enter a judgment of acquittal, and to order that references the arrest and criminal proceedings be expunged from official records.	2/14/2025: H.R. 1379 introduced in House; referred to Judiciary Committee
Litigation Transparency Act of 2025	<u>H.R. 1109</u> <i>Sponsor:</i> Issa (R-CA) <i>Cosponsors:</i> <u>7 Republican cosponsors</u>	CV 5, 26	Most Recent Bill Text: https://www.congress.gov/119/bills/hr1109/BILLS-119hr1109ih.pdf Summary: Would require a party or record of counsel in a civil action to disclose to the court and other parties the identity of any person that has a right to receive a payment or thing of value that is contingent on the outcome of the action or group of actions and to produce to the court and other parties any such agreement.	2/7/2025: H.R. 1109 introduced in House; referred to Judiciary Committee
Alexandra's Law Act of 2025	<u>H.R. 780</u> <i>Sponsor:</i> Issa (R-CA) <i>Cosponsors:</i> Kiley (R-CA) Oberholte (R-CA)	EV 410	Most Recent Bill Text: https://www.congress.gov/119/bills/hr780/BILLS-119hr780ih.pdf Summary: Would permit a previous nolo contendere plea in a case involving death resulting from the sale of fentanyl to be used as evidence to prove in an 18 U.S.C. § 1111 or § 1112 case that the defendant had knowledge that the substance provided to the decedent contained fentanyl.	1/28/2025: H.R. 780 introduced in House; referred to Judiciary and Energy & Commerce Committees
Protect the Gig Economy Act of 2025	<u>H.R. 100</u> <i>Sponsor:</i> Biggs (R-AZ)	CV 23	Most Recent Bill Text: https://www.congress.gov/119/bills/hr100/BILLS-119hr100ih.pdf Summary: Would add a requirement to Civil Rule 23(a) that a member of a class may sue or be sued as representative parties only if "the claim does not allege the misclassification of employees as independent contractors."	1/3/2025: H.R. 100 introduced in House; referred to Judiciary Committee

TAB II

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Machine-Learning and Proposed Rule 707
Date: October 1, 2025

Since its meeting in Fall 2023, the Committee has been considering the challenges posed by the development of artificial intelligence (AI) and its possible impact on evidence offered at a trial. The Committee has convened two separate panel discussions to obtain information from experts in the field. The Committee has focused on two separate concerns: 1) The problem of “deepfakes” and how to assure that the Evidence Rules on authenticity will work to prevent hard-to-detect fake video and audio evidence from being admitted at trial; 2) The problem of machine learning and how to assure that machine learning output is reliable, if such evidence is admitted without the testimony of an expert.

Previously the discussions of deepfakes and machine learning were combined in one memo. But as the Committee has discovered, the concerns about machine learning are different from those raised by deepfakes. Specifically, machine learning raises issues of reliability while deepfakes raise issues of authenticity. Moreover, the Committee has decided to make a proposal on machine learning but to hold back on a proposal on deepfakes. Accordingly, these two AI topics are now going to be treated in separate memos.

This memo concerns machine learning and the proposed Rule 707 that was released for public comment on August 15. The public comment period ends on February 16, 2026.

This memo is in three parts. Part One discusses new developments and articles that have arisen since the last meeting. Part Two discusses the problem that machine learning raises for the Evidence Rules, and the proposed Rule 707. Part Three discusses comments received to date, and other issues to consider on proposed Rule 707.

It must be emphasized that machine learning/Rule 707 is not an action item for this meeting. The Committee of course needs to wait for all the public comment to be received before taking any action. Nonetheless, tentative decisions can be made in response to issues that have been raised so far, if the Committee deems that appropriate.

I. New Developments

A. Articles

1. *Distinguished Evidence Scholar Embraces the Committee's Approach to Machine Learning as Raising Issues under Rule 702, not 901.*

Ed Imwinkelried, *The Challenge that the Advent of Artificial Intelligence (AI) Tools Poses to the Procedures for Determining the Existence of the Preliminary Facts that Condition the Admissibility of Items of Evidence*, 108 Marquette Law Review 621 (2025).

Professor Imwinkelried first argues that Rule 901(b)(9) (providing a ground of authenticity for systems that render accurate results) is not the proper rule for regulating machine learning evidence, because the questions of machine learning are about reliability, not authenticity. He points up that Rule 901(b)(9) at bottom is problematic because it confuses authenticity and reliability:

With respect to Rule 901(b)(9), the federal drafters committed a mistake. Rule 901(a) sets out the conditional relevance standard of proof; Rule 901(b) indicates that that standard governs the listed authentication issues. One such provision is Rule 901(b)(9): “Evidence describing a process or system and showing that it produces an accurate result.” Even at first blush, the provision is an odd fit for Rule 901. Every other provision in Rule 901(b) describes a technique for authenticating a particular item of evidence. In contrast, Rule 901(b)(9) describes techniques—processes or systems—that can be used to generate items of evidence that in turn will require authentication; Rule 901(b)(9) is an apple among oranges. The content of 901(b)(9) is one step removed from the content of all of the other provisions of 901(b). The other provisions deal with the authentication of a particular writing, audio, or image, while 901(b)(9) deals with a system such as an AI tool that can generate a writing, audio, or image. **There is a strong case that 901(b)(9) does not belong in Rule 901 and that the validation of a process or system should not be governed by Rules 104(b) and 901(a).**

Professor Imwinkelried goes on to explain why machine learning raises issues that are better addressed as ones of reliability, not authenticity --- with the important point being that the higher, Rule 104(a), standard must be applicable:

Treating proof of the accuracy of a process or system as a conditional relevance fact is wrong minded. Three factors point to the conclusion that, instead, the fact should be characterized as a competence issue governed by Rule 104(a). First, in the jurors’ minds, the typical conditional relevance issue presents a binary choice. When the issue is the witness’s personal knowledge, either the witness saw the accident, or she did not. Or when the question is the authorship of a letter, the juror tends to view the issue as whether the defendant wrote the letter. However, the testimony about the validation of a scientific methodology is quite

different. The testimony is usually probabilistic in nature, since there is always a margin of error. * * * *Realistically, we cannot be as confident that the jurors' exposure to the scientific testimony will not influence the balance of their deliberations at least at a subconscious level.*

Two other considerations magnify that danger. The first additional consideration is the length of the trial testimony about the validity of the scientific methodology. * * * Under Rule 901(b)(1), the proponent can establish authorship and authenticate a writing by presenting the testimony of a witness to the execution of the writing. The proponent can lay the foundation in a matter of minutes. Foundational testimony about the validity of scientific methodologies stands in stark contrast. If the methodology is a complex process, the testimony can consume thousands of pages of lower court transcripts. When a juror has sat through days or weeks of testimony about a scientific methodology, *it is naïve to think that the juror can readily put the testimony aside even if he or she decides at a conscious level that the testimony is technically inadmissible.* It is hard to unring a bell that has been clanging that long. The third factor is the nature of scientific testimony. It is easy for the jury to understand a witness's claim that he saw an accident or that she saw a person sign a check. That testimony is simple and straightforward; to assess that testimony, the jurors need only draw on their fund of lay knowledge and experience. However, in the typical case a lay juror will find it much more challenging to digest the testimony about the validation of a scientific process such as single nucleotide polymorphism (SNP) DNA typing or the use of forensic entomology to estimate time of death. To understand that testimony, the juror must expend greater mental effort. The juror must process the testimony more deeply; the psychological literature demonstrates that the more intensely a person processes information, the more difficult it is for him or her to later put the information out of mind. * * * The combination of these considerations indicates that it is wrong to classify the validation of a scientific process or system as a conditional relevance fact.

Professor Imwinkelried concludes that the solution is to ignore Rule 901(b)(9) authentication and proceed to a Rule 702-type inquiry for machine learning evidence:

[T]he courts should ignore Rule 104(b) when they pass on the admissibility of AI products. AI programs are scientific techniques; policy strongly favors treating the preliminary facts conditioning the admissibility of testimony based on scientific techniques as issues governed by Rule 104(a). The evaluation of the merit of a scientific technique is not a simple, binary decision such as whether the witness did or did not see an accident or whether the defendant did or did not sign a contract. * * * Given the nature of the choice, the length of the testimony, and the necessary depth of processing the information, the preliminary fact of the validity of a scientific methodology does not fit the classic conditional relevance mold.

Neither the text of Rule 104(b) nor the accompanying Advisory Committee Note contains any suggestion that the drafters ever intended that

judges would use the 104(b) procedure to decide the admissibility of scientific evidence. However, the reference to “process or system” in the text of Rule 901(b)(9) does carry such a suggestion. *In truth, when they pass on scientific evidence, the courts almost never cite Rule 901(b)(9); intuitively, most judges realize that the conditional relevance procedure is simply not a good fit for resolving the admissibility of expert testimony.* However, especially since some of the scholarly commentary on AI mentions Rules 104(b) and 901(b)(9), the retention of 901(b)(9) at the very least creates the potential for mischief. A straightforward solution would be repealing Rule 901(b)(9). * * * The existence of Rule 901(b)(9) can result in the application of inappropriate preliminary factfinding procedures. * * * A judge should not have to ignore a seemingly applicable provision to reach a sensible result. [Emphasis added]

Professor Imwinkelried concludes as follows:

In principle, the question of the reliability of an AI program is analogous to the question of the validity of the myriad expert techniques that the courts have passed on by using the procedures set out in Rule 104(a). These techniques are beyond the lay knowledge of the typical juror, and the quality of their output depends on scientific principles and methods embedded in their software. When the *Daubert* Court confronted the question of the admissibility of scientific evidence, the Court had no hesitancy directing trial judges to follow Rule 104(a) in making their Rule 702 rulings.

Comment: Professor Imwinkelried’s article does not mention Rule 707, which had not been issued at the time of its writing. But his strong arguments in favor of a reliability inquiry under Rule 104(a), as opposed to an authenticity inquiry under Rule 104(b), are right in line with what the Committee has done under the proposed Rule 707.

As to the argument that Rule 901(b)(9) should be abrogated: He is right that Rule 901(b)(9) is problematic because it answers the authenticity question by requiring a showing of reliability. The rule is no help at all if the proponent actually wants to prove up *unreliable* machine-based results --- such as where the proponent is arguing that it was defrauded into relying on unreliable machine-learning. Moreover, it is clear that the Rule 104(b) standard is not strict enough if the concern is that the proffered machine evidence is unreliable. Rule 104(a) should govern, as Professor Imwinkelried demonstrates.

But this does not necessarily mean that Rule 901(b)(9) should be abrogated. Abrogating a rule is a major step, and the consequences of abrogating a rule need to be seriously considered. The rule has a role outside of machine-learning, such as providing a ground of authenticity for simple machine-generated evidence, and so deleting it could have negative consequences.

What the Committee has done with Rule 707 is to render Rule 901(b)(9) *irrelevant* when it comes to machine learning evidence. A proponent who purports to satisfy Rule 901(b)(9) (under the lax Rule 104(b) standard) has not established admissibility of the item.

The proponent must still establish that the evidence is reliable --- under Rule 702 if it is the basis of expert testimony, and under Rule 707 if it is admitted without an expert. As Professor Imwinkelried points out, when an expert testifies on the basis of machine learning, Rule 702 *already* renders Rule 901(b)(9) irrelevant. Rule 707 does the same if the machine learning evidence is admitted without the testimony of an expert.

2. *Article questioning the reliability of AI evidence.*

Butler, *Fingerprints of Injustice: The Truth Behind Artificial Intelligence and Algorithmic-Driven Evidence*, 28 Chapman L.Rev. 419 (2025):

Concerns of AI takeover create an inflated and overstated idea of AI's true capabilities, painting a picture of computers that can think just as well, or even better, than humans. In reality, computers remain incapable of independent thought, of doing anything beyond following the instructions of a programmer, and AI software is far from being as objective and infallible as people might believe. The multitudes of documented errors in both functionality and AI's ability to draw conclusions is a startling prospect when such systems are used as definitive asserters of truth in court.

* * *

Empirical data shows there is not a single sector of ML or AI-driven software free from errors. While facial recognition has high accuracy in an ideal environment, real-world conditions are often far from perfect and result in high error rates. Programmers have attempted to fix inaccuracies such as this with self-correction tools, but LLMs sometimes actually perform worse with self-correction measures, and self-correction isn't consistently effective. * * * The building blocks of Gemini, TrueAllele, and COMPAS are the same—algorithms and lines of code telling the computer what to do—but just because errors are more clearly visible in GenAI does not mean errors do not exist in programs like COMPAS; simply, those errors are more easily hidden. These programs have also been shown to misidentify female and minority populations at a disproportionate rate, often because of the skewed and incomplete information used to train the underlying algorithms.* * *

The author's suggested solution to these AI reliability issues is to establish a federal agency with AI experts that would be deployed to determine reliability, with access to source codes.

Comment: The fact that AI can often lead to unreliable results is all the more reason to have evidence rules directed at the admissibility of AI evidence.

3. *Article discussing the differences between machine learning and human learning, and arguing for a change to the rules.*

Victor N. Metallo, *The Impact of Artificial Intelligence on Forensic Accounting and Testimony--Congress Should Amend "The Daubert Rule" to Include a New Standard*, 69 Emory L. J. Online 2039 (2025):

Major strengths of machine learning versus human learning are: (1) machines can process large amounts of data; (2) machines can find weaker or more complex patterns in data and work better in less predictable environments; and (3) machines can be more consistent decision makers because they are less susceptible to cognitive bias. Major weaknesses include: (1) lack of model flexibility; (2) not all problems have the correct data to learn; (3) data reflects bias in the real world; (4) not every problem can be solved with mathematical analysis, which is the only output with machine learning applications; and (5) other considerations must be factored into decisions, including privacy issues, that AI may not be able to address the same way humans can. Therefore, AI has its positive uses, but only a human expert can make that unique, psychological connection with the jury.

The author concludes that the Evidence Rules should be amended “to permit a court discretion to determine testimony inadmissible where: (1) a judge cannot take judicial notice of an AI process; or (2) a party has not proffered an expert to assist in explaining the AI’s processes to a jury; or (3) where the AI has reached a point that black box processes cannot be explained by human testimony, because AI has adapted the ability to program itself.”

Comment: The author makes the important point that certain machine learning processes may not be explainable. The consequences of lack of explainability would likely be inadmissibility under Rule 702 and 707. It will certainly be difficult to prove that machine learning is more likely than not reliable if its process can’t be explained. The equivalent is an experience-based expert. Under Rule 702 and *Kumho Tire*, experience-based testimony is not admissible unless the expert can explain plausibly how she came to her conclusion.

Query whether something should be added to the Rule 707 Committee Note to address the result that should be presumed if the machine learning is not explainable --- with the possible exception being that the methodology is verified by testing the program and showing results that indicate a low rate of error. That point is discussed below in section 3.

4. *Article concluding that machine learning evidence should be regulated under Rule 702.*

Patrick Nutter, *Machine Learning Evidence: Admissibility and Weight*, 21 Penn Journal of Constitutional Law 919 (2024).

The article talks about how the rate of error factor can be applied to machine learning, noting that sometimes it will be difficult to assess what an “error” is:

Machine learning algorithms usually have two important error rates. The first is its test set error rate with respect to training data, which are the examples whose properties are already known to the researcher and which are the basis for the algorithm’s improved performance over time. Eventually, a second error rate captures the algorithm’s performance when it is unleashed upon real-world examples with unknown properties. Both error rates typically appear as a singular number that masks other important statistics, like whether the algorithm is more likely to give false positives or false negatives, an important detail that should be revealed at a *Daubert* hearing * * *.

Subjective programmer judgments can inform the error rate, such as whether or not to give partial credit for a partial success, though in some contexts it is difficult to assess what should be considered a success or failure in the first place. **For example, in a lip-reading algorithm, is an inelegant but understandable translation a success or a failure? And if it is only a partial success, how partial is it? The answer, which will inform the error rates, is ultimately a human judgment, and there may be no consistency from one programmer to another.** For purely binary outcomes, like the task of identifying a defendant, no such thing as partial success would exist, because the individual the algorithm is identifying in a video, photo, or recording either is the defendant or is not.

Additionally, a machine’s overall stated error rate may mask a higher rate of error when it draws conclusions about a defendant who does not share characteristics with the initial training data. For instance, an error rate for a machine that has been trained on racially diverse data may be less reliable for a single racial category than others. In one facial recognition application, the software is right 99 percent of the time but only when the person in the photo is a white man. But the darker the skin, the more errors arise--up to nearly 35 percent for images of darker skinned women. Yet, oftentimes today’s machines are not trained on racially diverse data, which presents other problems for how to generalize its conclusions. For instance, one recent facial recognition system reported 97.35% accuracy but on a dataset that turned out to be 77.5% male and 83.5% white. Its error rates were never broken down by race or gender.

Thus, the mosaic of different possible error rates presents a more complicated picture than a single, impressively low error rate may reflect. For this

reason, *machine learning evidence is particularly susceptible to violating Rule 702(d)'s requirement that the evidence be "reliably applied the principles and methods to the facts of the case"*. If an algorithm has an impressive rate of error with respect to data that bears little resemblance to the instant defendant, then its conclusions are not being reliably applied to the facts of the case. [Emphases added.]

The author analyzes how the requirement of "sufficient facts or data" is to be applied to machine learning evidence:

1. How Large Was the Training Dataset?

Sample size is an initial inquiry that is by no means unknown to lawyers challenging scientific evidence. Machine learning algorithms require very large datasets to extract useful patterns and make accurate assessments, and more complicated tasks require more examples to fine tune their accuracy. For instance, text recognition (a relatively simple task) may require only a few thousand examples, whereas language translation (an extremely complex task) requires tens of millions of examples. *The party seeking to admit the evidence would want assurances that the training data is sufficiently large for the given task, whereas the party seeking to exclude the evidence would want to inquire as to how many examples the algorithm has learned and if that number is in keeping with what is generally accepted for the task.* [Emphasis added.]

2. Were the Training Data Gathered or Generated in Ways that Produced a Biased Sample?

Not only must the dataset be large, but it also must have some baseline quality to make useful predictions. The quality of the data, and the extent to which it may be biased in a particular way, can be probed with various inquiries. Where did the data come from? Did the researcher him-or-herself gather the data according to accepted methods? If the researcher instead received the data from a third party, can he or she vouch for its quality in any specific way? In the case of open source methods or crowdsourced data, which are common in the machine learning field, is such verification even possible?

* * * [E]ven if the prosecution relies on official statistics gathered by government agencies, these datasets are not inherently high quality. * * * While data-driven governance is often a laudable goal, today, the prevailing zeitgeist of governments is one of database expansion, not quality control or accountability, and a blasé acceptance of data error and its negative consequences for individuals. * * * When data are first gathered or generated, basic human error in collection or interpretation is common. Sometimes data are collected and uploaded without legal authorization or counter to what was initially ordered. Once errors are made, they are difficult to discover and difficult to correct. If the error is corrected in one

database, it is not guaranteed that the correction will filter to the myriad of other databases that had, in the past, copied from the initial database.

3. Was the Data Manipulated? If So, How, and Does that Matter?

When a dataset is not large enough, programmers have several techniques for manipulating it to artificially create a larger training set. For example, the algorithm may take many random samples from the original dataset to create many other, smaller datasets. The programmer may also intentionally distort the examples, such as by warping images or adding random noise. The forms of manipulation are largely influenced by subjective programmer judgment and norms in the field.

4. How Was the Data Tagged and Labeled?

Even if a large dataset is collected or generated using standard techniques, it must be labeled and organized properly, which, for datasets with millions of examples, is a menial but crucial task. Machine learning programs only “learn” what they are “taught” from the data, and it is the programmers who make judgments about what the data show by the way that they are labeled. Indeed, researchers can intentionally teach the algorithm nonsense simply by labeling. In that way, who labeled the data and how--and the extent to which the labeling was done properly--are critical inquiries. * * * Often researchers use open datasets already created for public use, but the researcher may have no idea how that data set was created and labeled. * * *

The author analyzes how problems in the source code will affect the 702-based enquiry:

If the programming itself contains errors, then it is possible that the program’s conclusions are not the “product of reliable principles and methods.” Broadly speaking, “source code” is a combination of words and mathematical symbols that have a particular meaning in a programming language. Unlike “machine code,” which is a binary collection of 1’s and 0’s, the source code is human readable, and is likely to be intelligible to an opposing expert. Source code dictates which tasks a computer program performs, how the program performs the tasks, and the sequence in which the program performs the tasks. The source code can provide uninhibited access to the exact ways the programmer decided the machine will operate and is much more informative than simply observing what goes in and what comes out.

Crucially, the source code can reveal simple errors or faulty assumptions in the program’s creation. In a given program, millions of lines of code--often pieced together from innumerable sources and developers--give rise to simple accidents in transcription, mistakes in conditional programming, software rot, or faulty updates to legacy code. When one programmer designs the initial version of a program, it

may be difficult for subsequent programmers in later versions to work around or adapt to the personal style and conventions of the first. Studies demonstrate that, as a result, error rates of one percent in code are common, which can correspond to tens of thousands of errors in a single program.

Moreover, sometimes the software itself contains no errors in the programming, but, because of human errors in communication or misunderstanding, the program does not accomplish the task that was ultimately sought. When the device uses several different scientific disciplines--like, for example, the way a breathalyzer must incorporate knowledge from programming, chemistry, and biology--differences in understanding can give rise to methodological errors that do not come to light until even after product launch. In that case, the programming itself could be flawless, yet the machine would still be unreliable. * * *

[T]here is little reason to think that machine learning program development is immune from human misunderstanding, slips of the finger in transcription, faulty assumptions, or biases. It is true that machine learning algorithms work differently than programs of the past, with bigger sets of data, more processing power, and a different methodology. However, they are still created according to the ways that all software is created: as a product of human decision making, with lines of code running in conjunction with other software, and on hardware that degrades with time.[Emphasis added]

Next, the author discusses the problems that arise when the machine learning is far enough along on its own that its process cannot be explained:

Given the present state of the technology, it is foreseeable that when machine learning begins to produce substantive evidence in litigation, an expert witness on the stand-- perhaps even the individual who created the machine learning algorithm at issue--would not be able to explain how exactly it yielded the results. * * *

To illustrate how this problem manifests, consider the example of a programmer who is training a machine learning algorithm to recognize her mother's face in photographs. The algorithm could be identifying the mother by means that humans do, such as recognizing the collection of features in the height and width of the face, shape of the head and hair, and so on. But sometimes the machine might establish correlations and rules that are not apparent at first glance or that humans would not use. For instance, if the machine has only ever learned from images in which the mother was photographed with flash on, the machine may use the brightness of the image as a basis to identify the mother, and with more weight than any attribute about her face. If this were the case, when the machine later must confront an image of the mother in which she was not photographed with flash, the machine might not be able to identify her (a false negative), even though humans would not be confused by such a situation.

Conversely, the machine might mistakenly identify as the mother an entirely different woman who was photographed with flash (a false positive). In such a scenario, the machine learned a correlation that was undoubtedly accurate within the universe of data it was initially shown, but not one that would be reliable for all varying situations. This is a common problem with the rules that machines learn.

Whether the machine is deducing obvious rules (like facial attributes) or non-obvious and potentially unreliable rules (like brightness in an image) is impossible to predict *ex ante* and discovering what rules the machine has deduced sometimes requires considerable extra research for the programmer. Indeed, what rules and correlations the machine deduces may forever remain a mystery.

Machine learning is often unexplainable because of the sheer number of data points involved and “avalanche of statistical probability” involved. The sheer proliferation of different techniques, none of them obviously better than the others, can leave researchers flummoxed over which one to choose. Many of the most powerful are bafflingly opaque; others evade understanding because they involve an avalanche of statistical probability.

Responding to that deficiency is an entirely new subfield of machine learning research, dubbed “xAI,” for “explainable AI.” The Defense Department’s Defense Advanced Research Projects Agency (“DARPA”) is currently conducting research into how AI technologies can explain their decision-making processes, though the field is still in its infancy. Thus, for the foreseeable future, any machine learning output that is admitted into evidence bears a substantial likelihood that it will be unexplainable.

Few analogs exist to this problem in other forms of evidence used at trial. When scholars write about “black boxes” and evidence, they typically mean to highlight the fact that lay jurors do not fully understand how the device works--the implicit assumption is that experts do. But as machine learning exists now, that assumption is faulty, since experts often cannot fully account for machine learning determinations, in spite of the machine’s demonstrable accuracy for certain tasks.
[Emphases added]

Comment: This article is an excellent introduction into how Rule 707 might work. The inquiries that a court would need to make would, of course, track those that are made under 702. But evaluation of machine learning does raise special challenges. Particularly the problem of inexplicability is one that has to be addressed.

5. *Article on an AI-generated Victim testifying at a sentencing hearing.*

A.I.-Generated Likeness of Murder Victim Forgives His Killer in Court, New York Times, May 8, 2025:

The letters came streaming in: from battalion brothers who had served alongside Christopher Pelkey in Iraq and Afghanistan, fellow missionaries and even a prom date. A niece and nephew addressed the court. Still, the voice that mattered most to Mr. Pelkey's older sister, Stacey Wales, would most likely never be heard when it was time for an Arizona judge to sentence the man who killed her brother during a 2021 road rage episode — the victim's.

Ms. Wales, 47, had a thought. What if her brother * * * could speak for himself at the sentencing? And what would he tell Gabriel Horcasitas, 54, the man convicted of manslaughter in his case?

The answer came on May 1, when Ms. Wales clicked the play button on a laptop in a courtroom in Maricopa County, Ariz. A likeness of her brother appeared on an 80-inch television screen, the same one that had previously displayed autopsy photos of Mr. Pelkey and security camera footage of his being fatally shot at an intersection in Chandler, Ariz. It was created with artificial intelligence.

"It is a shame we encountered each other that day in those circumstances," the avatar of Mr. Pelkey said. "In another life, we probably could have been friends. I believe in forgiveness and in God, who forgives. I always have and I still do."

While the use of A.I. has spread through society, from the written word to memes and deepfakes, its use during the sentencing of Mr. Horcasitas, who got the maximum 10 and a half years in prison, appeared to be uncharted. * * * Critics argued that the introduction of A.I. in legal proceedings could open the door to manipulation and deception, compounding the already emotional process of giving victim impact statements.

One thing was certain: The nearly four-minute video made a favorable impression on the judge, Todd Lang, of the Maricopa County Superior Court, who complimented its inclusion moments before sentencing Mr. Horcasitas.

Much in the same way that social media apps have been placing labels on A.I.-generated content, the video opened with a disclaimer. "Hello, just to be clear, for everyone seeing this, I am a version of Chris Pelkey recreated through A.I. that uses my picture and my voice profile," it said. "I was able to be digitally regenerated to share with you today." * * *

Ms. Wales had been preparing her victim's impact statement for two years, she said, but it was missing a critical element. "I kept hearing what Chris would say," she said.

Ms. Wales said that she then enlisted the help of her husband and their longtime business partner, who had used A.I. to help corporate clients with presentations, including one featuring a likeness of a company's chief executive who had died years ago. They took Mr. Pelkey's voice from a YouTube video that they had found of him speaking after completing treatment for PTSD at a facility for veterans, she said. For his face and torso, they used a poster of Mr. Pelkey from a funeral service, digitally trimming his thick beard, removing his glasses and editing out a logo from his cap, she said.

Ms. Wales said that she had written the script that was read by the A.I. likeness of her brother. "I know that A.I. can be used nefariously, and it's uncomfortable for some," Ms. Wales said. "But this was just another tool to use to tell Chris's story."

* * * Ms. Wales emphasized that the video of her brother's likeness was used during only the sentencing phase of the case * * *.

On Nov. 13, 2021, Mr. Pelkey was stopped at a red light in Chandler when Mr. Horcasitas pulled up behind him and honked at him, prompting Mr. Pelkey to exit his vehicle and approach Mr. Horcasitas's Volkswagen and gesture with his arms as if to say "what the heck," according to a probable cause statement. Mr. Horcasitas then fired a gun at him, hitting Mr. Pelkey at least once in the chest.

Cynthia Godsoe, a professor at Brooklyn Law School and a former public defender * * * was troubled by the allowance of A.I. at the sentencing. "It's clearly going to inflame emotions more than pictures," Ms. Godsoe said. "I think courts have to be really careful. Things can be altered. We know that. It's such a slippery slope."

In the U.S. federal courts, a rule-making committee is currently considering evidentiary standards for A.I. materials when parties in cases agree that it is artificially generated, said Maura R. Grossman, a lawyer from Buffalo who is on the American Bar Association's A.I. task force. Ms. Grossman, a professor at the School of Computer Science at the University of Waterloo, who also teaches at the Osgoode Hall Law School, both in Canada, did not object to the use of A.I. in the Arizona sentencing. "There's no jury that can be unduly influenced," Professor Grossman said. "I didn't find it ethically or legally troubling."

Then there was the curious case of the plaintiff in a recent New York State legal appeal who made headlines when he tried to use an A.I. avatar to make his argument. "The appellate court shut him down," Ms. Grossman said.

Comment: Of course under Rule 1101, sentencing proceedings are outside the jurisdiction of the Federal Rules of Evidence. If an Avatar were employed at a trial, existing rules can and should prohibit it. The most obvious prohibition is hearsay. The statements made by the Avatar are prepared out of court and then processed into the Avatar. It is true that a machine cannot be cross-examined. But the person who put the statements into the machine certainly can be. In the end, the possible trial risk for Avatars is one that can be easily handled by the existing Evidence Rules.

It is clear that Avatars are distinct from deepfakes, by the way. Deepfakes involve an unacknowledged use of AI. The use of Avatars is obviously an acknowledged use of AI. Nobody is arguing that the victim actually made the statements that are being rendered.

6. *Article on Using AI to prepare illustrative aids under new Rule 107.*

US Law Week, Insight, *AI Enters the Courtroom With New Rule Governing Illustrative Aids*, July 23, 2025:

While the federal rules are silent on the use of AI, litigants can turn to AI to generate Rule 107 illustrative aids that help jurors understand evidence and arguments. Using AI to create illustrative aids may result in saving time and money.

Rule 107, which ensures that only accurate aids make it into the courtroom, requires that an aid be a fair and accurate representation of a fact or issue in dispute. Thus, just like attorney-created aids, an AI-created aid must not misrepresent or confuse the facts in a way that is unfairly prejudicial or misleading.

As long as an AI-generated illustrative aid is a fair and accurate representation, it is immaterial that it was created by AI.

Using AI to generate an illustrative aid may present a slightly higher risk of digital manipulation. To guard against this risk, litigants should review and validate the AI-created aid to ensure that it fairly and accurately represents the facts. * * *

Get court guidance (or negotiate with the other parties) on whether or when illustrative aids must be disclosed or exchanged.

Review adversaries' illustrative aids for accuracy and consider whether a disclaimer is needed if it is AI-generated to avoid juror confusion. Also consider whether to request a limiting instruction from the court on the limited purpose for which the jury can use the aid. Request that the court mark the aid and enter it as part of the record under Rule 107(c).

Potential amendments to the federal rules so far have focused on AI-generated evidence—not illustrative aids under Rule 107. *Concerns about authenticity and admissibility issues for AI-generated evidence offered to prove a disputed fact don't extend to AI-generated illustrative aids because they aren't offered as evidence.*

Rule 107 should allow for AI-created trial graphics and other illustrative aids to be used in courtroom presentations. But attorneys should be familiar with the limitations of the content and use of such graphics and aids, particularly as courts continue to grapple with the intersection of new Rule 107 and AI-generated graphics.[Emphases added]

Comment: As the author indicates, the Committee need not worry about AI used to generated illustrative aids. This is particularly true after Rule 107, which emphasizes that they are not evidence. Rule 107 gives the court ample authority to control problematic illustrative aids, including those generated by AI.

7. *Article: Favorable view of Rule 707, but with a suggested change.*

Bexis, *Federal Judicial Conference Evidence Rules Committee Releases Possible New Rule Pertaining to Artificial Intelligence. June 2, 2025:*

We were struck by the potentially broader applicability of the anticipated Rule 707 analysis. The proponent of such machine generated evidence would be required to:

Consider whether the inputs into the process are sufficient for purposes of ensuring the validity of the resulting output. For example, the court should consider whether the training data for a machine learning process is sufficiently representative to render an accurate output for the population involved in the case at hand.

Consider whether the process has been validated in circumstances sufficiently similar to the case at hand.

Other “problems” that the drafters expected the new rule to address are: “using the process for purposes that were not intended,” “analytical error or incompleteness,” “inaccuracy or bias built into the underlying data or formulas,” and “lack of interpretability of the machine’s process.”

But machine-generated evidence presents these issues, no matter what witness presents it. So our reaction is that the proposed rule should remove the limiting phrase “without an expert witness” as superfluous. Consider the factors set forth above. All of those things: sufficiency of the inputs; validation in sufficiently similar fact patterns; using the analysis for unintended purposes; analytical error; incomplete analyses; inaccuracy; built-in bias; and opacity of the analytic

processes – are concerns whether or not the computer-generated material has a litigation “expert” standing behind it. Indeed, it is our experience that such experts are experts precisely in building bias and inaccuracy into computer models.

So we think that limiting proposed Rule 707 to “machine-generated evidence offered without an expert witness,” is totally unnecessary. All such evidence, with or without an expert witness vouching for it, suffers from the same potential problems. Such evidence is, from the jury’s perspective, essentially a black box – into which paid litigation experts pour whatever their employers need to prove their cases. Rule 707 should be an independent rule establishing a set of admissibility criteria applicable to all “machine generated evidence,” since expert or no, such evidence presents the same reliability problems.

In that sense, we think that Rule 707, as reported out of committee, is much too narrow * * *. On the other hand, defining Rule 707 as applying to all “machine generated evidence” may be too broad. To us, that phrase easily encompasses all of those fancy accident reconstruction graphics that both sides’ experts employ in civil cases and crime scene ballistics in criminal prosecutions. To the extent that the proposed rule is directed at machine learning and generative artificial intelligence, use of the term “machine generated evidence” may be too broad. We note that the alternative phrase, “machine learning,” has been offered, with a definition:

Machine learning is an application of artificial intelligence that is characterized by providing systems the ability to automatically learn and improve on the basis of data or experience, without being explicitly programmed

To avoid Rule 707 sweeping more broadly than intended, the drafters may want to reconsider this alternative phraseology.

In sum, we think that the Rules of Evidence are sorely in need of a rule directed specifically to black box computerized evidence – and that this need is equally acute whether an expert is used to introduce such evidence, or no. We hope that Rule 707 can be that vehicle.

Comment: If an expert is opining on the basis of machine-learning, then that AI can be --- and is --- regulated under Rule 702, because there is an expert witness. You don’t need Rule 707 to regulate machine learning if there is an expert. A number of cases discussed previously --- such as the facial recognition case in federal court, and the video enhancement case in Washington, regulated the machine learning under the existing expert witness rules. If Rule 707 applies to every use of machine learning, even when an expert testifies, confusion is likely to reign. Does the court evaluate the machine learning under Rule 707 but then assess proper application by the expert under Rule 702? There is no need for such a confusing system.

The author's other point about "machine-generated" being too broad is one of which the Committee is well aware. The author advocates using "machine learning" and quotes from the memo in the Spring agenda book at that alternative. That alternative is set forth once again later in this memo.

8. *Article containing a discussion of Proposed Rule 707.*

Stewart and Legg, *Rules Governing AI in Courtrooms Lag Behind Tech Advancement*, July 22, 2025:

The rules of evidence have long served as the evidentiary gatekeeper for courtrooms, ensuring juries and courts see reliable information before making decisions. But these rules weren't designed for the challenges evidence generated by artificial intelligence present. A proposed amendment to the Federal Rules of Evidence, Rule 707, could change that.

In June 2025, a committee of the US Judicial Conference voted to publish Rule 707 for public comment—a critical step toward its potential adoption. At its core, the proposed Rule 707 is designed to ensure that AI-generated evidence is trustworthy. It focuses on a specific scenario: when a party uses AI to perform the work traditionally done by a human expert witness, but presents the findings without one.

Think of an expert who analyzes stock market data to prove a company committed fraud, or one who compares software code to detect copyright infringement. Under the new rule, if a party uses an AI model or tool to perform that same analysis, the AI-generated evidence must meet the same rigorous standards for reliability that a human expert would under the existing Rule 702.

This means the party introducing the AI evidence can't simply present the results. They must be prepared to prove:

- The AI model or tool's underlying data and methods are sound.
- The technology isn't based on biased or incomplete information.
- The AI model or tool's conclusions are accurate and was validated.

The goal is to prevent parties from using an AI "black box" to generate favorable evidence without having to explain how it was produced. You can cross-examine a human expert on their methods and potential biases; you can't cross-examine an algorithm. Rule 707 attempts to solve this by forcing the user of the AI to "open the hood" of its technology and demonstrate its reliability.

The proposal isn't without its critics. The US Department of Justice, in a lone dissenting vote at a May 2025 committee meeting, argued that the existing rules for expert testimony are already sufficient to handle AI-generated evidence.

Other critics contend the proposed rule is too narrow. It only applies when AI evidence is offered without a human expert. They argue that the risks of an AI model or tool's hidden biases persist even when a human expert presents the findings, a scenario the current draft of Rule 707 doesn't address.

Despite these objections, if Rule 707 is adopted, it will signal a major shift in how AI-generated evidence is treated. Lawyers and their clients will need to be ready to scrutinize an AI model or tool's fundamental design. This will likely lead to high-stakes legal fights over access to proprietary source code and training data, pitting the need for courtroom transparency against corporate secrecy.

9. *Article discussing proposed Rule 707.*

Barnes and Thornburgh, *New Evidence Rule 707 Would Set Standards for AI-Generated Courtroom Evidence*, August 25, 2025:

On August 16, 2025, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States issued draft amendments to 10 rules across appellate, bankruptcy, civil procedure, criminal procedure, and evidence. Among them is a revised version of proposed Rule 707, now open for public comment through February 16, 2026.

The proposed text states:

Machine-Generated Evidence: When machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court may admit the evidence only if it satisfies the requirements of rule 702(a)-(d). This rule does not apply to the output of simple scientific instruments.

Any AI output offered into evidence, even outside the testimony of an expert witness, must still meet the standard for expert testimony — namely, it must:

- Assist the trier of fact
- Be based on sufficient facts or data
- Be the product of reliable principles and methods
- Reflect a reliable application of the principles and methods to the facts

The application of the Rule 702 standards to AI-generated evidence aligns with the expert testimony standards' intent. Evidence should not result from a black box; it should be subject to analysis, cross examination, and scrutiny. Just as an opponent can question an expert witness's application of a methodology to the facts of the case, Rule 707 would allow the opponent of AI-generated evidence to delve into how the piece of evidence was generated. Discovery about how AI-generated evidence was created, and what prompts and other information may

have been provided to an AI tool, are likely to result in battles over discoverability, the applicability of privileges like the work product privilege, and how far litigants can peer into their opponents' usage of AI.

The Committee Note to this proposed rule highlights this point in stating:

When a machine draws inferences and makes predictions, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses.

These concerns include misuse of an AI model, inherent bias, incomplete factual support for the output generated, and lack of transparency into how outputs were generated.

According to the Committee, the purpose of Rule 707 is to prevent the proponent of machine-generated evidence from evading “the reliability requirements of Rule 702 by offering machine output directly, where the output would be subject to Rule 702 if rendered as an opinion by a human expert.” This comment suggests that Rule 707 is intended to be an extension of the expert witness standard of Rule 702 to the context of AI-generated outputs. The focus of a court’s analysis under the proposed Rule 707 would be on the sufficiency of the AI inputs (also known as prompts), the internal processes of the AI platform, and the validity of the resulting outputs.

The proposed Rule 707 exempts simple scientific tools from the rule’s reach. Such tools include thermometers, scales, and other commonly used devices.

Takeaway

As the use of AI expands, the admissibility of its outputs in court will become a more central focus. It is likely that new discovery battles will arise over the usage of AI, including how litigants have used AI to generate evidence they seek to use in court. Courts will be asked to weigh the reliability of AI outputs that are offered into evidence at trial. The proposed new Rule 707 presents one approach to addressing this issue.

10. Article discussing Rule 707.

Faegre Drinker, *ChatGPT As Your New Testifying Expert Under Proposed Federal Rule of Evidence 707? Maybe Not.*, <https://www.jdsupra.com/legalnews/chatgpt-as-your-new-testifying-expert-3586682/> (9/11/25):

How would Rule 707 function if adopted? While the proposed Rule and Committee Note sketch out a possible answer, they also hint at struggles to come.

First, Rule 707 would apply only to evidence “offered without an expert witness.” Indeed, although the proposed Committee Note explains that Rule 707 “is not intended to encourage parties to opt for machine-generated evidence over live expert witnesses,” it also contemplates Rule 707 being invoked when “machine or software output is presented without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability).” Comments in the Committee’s June 10, 2025 Agenda Book illustrate the complexity of outputs Rule 707 could govern, including “machine output analyzing stock trading patterns to establish causation; analysis of digital data to determine whether two works are substantially similar in copyright litigation; and machine learning that assesses the complexity of software programs to determine the likelihood that code was misappropriated.” But without an expert to vouch for such machine-generated evidence, how will proponents establish that these outputs satisfy Rule 702(a)-(d)? Indeed, courts have already rejected AI-generated opinions where counsel could not explain the tool’s basis or methodology. * * * [W]e suspect courts will be skeptical of the basis and reliability of evidence offered under Rule 707 for the foreseeable future.

Second, proposed Rule 707 would not apply to “the output of basic scientific instruments.” This language notably omits a clause that appeared in an earlier draft of Rule 707, which further excepted the output of tools that were “routinely relied upon commercial software” out of concerns that not all commonly used tools are reliable. The proposed Committee Note offers a few examples that would meet the exception as currently phrased: “the results of a mercury-based thermometer, an electronic scale, or a battery-operated digital thermometer.” While it seems obvious that the output of a calculator would meet the exception and that a Rule 26 report drafted in its entirety by an AI chatbot would not, we predict that battles over exactly what constitutes a “basic scientific instrument” will initially outpace battles over the admissibility of specific evidence pursuant to Rule 707. Given the proposed Committee Note’s observation that “the rule does not apply when the court can take judicial notice that the machine output is reliable” under Rule 201, it may be that the “basic scientific instrument” inquiry will look like the *Frye* “general acceptance” test for scientific evidence that was displaced by the modern Rule 702 reliability inquiry that other machine-generated outputs would need to satisfy under Rule 707.

These are by no means the only questions courts will need to wrestle with when applying proposed Rule 707. While parties and counsel should be aware of the potential efficiencies and impact of machine-generated “expert” opinions on litigation, there is reason to believe courts will be slow to accept the more ambitious uses of such evidence, even under Rule 707 as proposed.

Comment: It is probably true that Rule 707 will be hard to meet. Without an expert, it will be hard to qualify, under Rule 702 standards, any output of a machine learning system. But that hardly seems like a bad thing. In fact it is the whole point of the rule. Machine learning outputs are universally believed to be subject to significant reliability

problems. It would be absurd if the output of a machine learning system got a pass because the proponent seeks to admit it without an expert. Indeed, without Rule 707, a party has an incentive to introduce machine learning evidence without an expert.

One could say that “Rule 707 will hardly ever apply because the party will need an expert anyway.” But where a party gets an expert to handle the reliability issues attendant to machine learning, Rule 707 *has* applied. It has deterred the potential abuse of end-running Rule 702 by proffering machine learning output without an expert.

The argument that the *Frye* test will be applicable to machine learning systems is belied by the fact that the rule’s reliability requirements are specifically grounded in Rule 702. As to the possibility of taking judicial notice so that the machine generated evidence is not covered by Rule 707: Rule 201 is already being applied to admit well-established machine data, such as googlemaps. See Jeffrey Bellin and Andrew Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 Nw. U. L. Rev. 1137 (2014) (“State and federal courts are already applying the surprisingly pliant judicial notice rules to bring websites ranging from Google Maps to Wikipedia into the courtroom, and these decisions will only increase in frequency in coming years.”). So the Committee Note’s mention of the possibility of judicial notice is nothing new.

11. *Article on views about Rule 707.*

Karp, *New AI Evidence Rule Is A Good Start, But More Is Needed*, Law 360, Aug. 27, 2025:

A new federal rule, if adopted, would subject machine- and artificial intelligence-generated evidence presented in federal court without the testimony of a human expert to the same admissibility standards as evidence offered with expert testimony. The proposed Rule 707 is “smart,” “a movement forward” and “necessary” to close a loophole in evidentiary rules, according to attorneys, who say it’s not currently clear what standards AI-generated evidence must meet when not accompanied by expert testimony.

But the rule doesn’t go far enough and leaves a lot of questions unanswered, including about what happens when parties disagree over whether a piece of evidence was actually created by AI, these attorneys caution. * * *

“To be sure, Rule 707 is a prudent stopgap that will deter the worst abuses of AI-generated evidence,” said Texas A&M University School of Law professor G. Alexander Nunn. “You can think of Rule 707 as a useful Band-aid. It will stop the bleeding, but it is not the major surgery [that] evidence law truly needs to adapt to the computational age.”¹

Here’s what attorneys are saying about Rule 707.

¹ Reporter’s Note: Nunn does not say what major surgery he would require. It’s easy to talk.

“It’s an improvement. I think it’s a move forward.” – Osgoode Hall Law School professor Maura R. Grossman

“At the end of the day, courts want to make sure that reliable evidence is being used ... I’m glad and grateful that they’re thinking proactively about this.” – Barnes & Thornburg partner and artificial intelligence chair Nicholas A. Sarokhanian

“It’s promising and good to hear that proposed Rule 707 is in the mix. This type of evidence is coming, so I think it’s helpful to hear that the process is open now.” – Barnes & Thornburg partner Kaitlyn E. Stone

[Today] it remains unclear what rule * * * governs machine-generated evidence that is presented without expert testimony, which could include AI systems that analyze stock market data in securities fraud cases, software that compares source code to detect copyright infringement, and AI tools that merge GPS data, keycard logs and calendars to reconstruct event timelines, according to attorneys.

The general rules requiring that evidence be authenticated and relevant would presumably apply to this kind of information, but there’s nothing specifically targeted at machine-generated evidence, said Barnes & Thornburg LLP associate William M. Carlucci.

Current Rules 901 and 902, which cover evidence produced by data compilations, processes or systems, are likely the most applicable to AI-generated evidence, but those rules are inadequate given that they require only that that evidence be authenticated and accurate, according to attorneys.

But “authentication is a notoriously low bar and does not really provide a robust check on reliability,” Nunn said. And “accurate” is a vague term that usually isn’t used by scientists, according to e-discovery expert and Osgoode Hall Law School professor Maura R. Grossman, who added that the existing regime isn’t crafted to address evidence created by AI.

Nunn said the current rules’ inadequacy became particularly apparent once courts began admitting evidence like algorithmic risk scores and facial recognition matches in criminal cases with only a minimal showing of authenticity.

Similar assertions offered by human experts would face a *Daubert* challenge to their reliability and relevance, Nunn said. But prosecutors can dodge that reliability scrutiny as well as the Sixth Amendment’s right to confront witnesses simply by offering a machine’s raw output through a technician who just operated the machine but isn’t an expert. “Rule 707 would end this dangerous inconsistency,” he said.

Attorneys who spoke with Law360 Pulse about the proposed Rule 707 largely applauded the change. But even though it may be an improvement, the proposed rule could come with some drawbacks, according to these experts. For starters, as with *Daubert* challenges, the rule leaves it to judges to determine the validity of any machine-generated evidence, a determination many judges may not be technologically savvy enough to make, attorneys warned.

“Asking judges to assess the reliability of a complex neural network, which may be a black box even to its creators, stretches this contested paradigm to its breaking point,” Nunn said.

Another concern is that the rule could actually encourage litigants to rely more heavily on evidence created by artificial intelligence and to introduce that evidence without expert testimony, according to experts.

The rule could even spur AI companies to begin designing their products for specific types of litigation, said Rumberger Kirk & Caldwell PA partner Leonard J. Dietzen III, who predicts “an exponential growth in AI use” in federal court if Rule 707 is finalized. The advisory committee said in the notes accompanying the proposed rule that that’s not what it’s trying to do.

DLA Piper of counsel Allen Waxman said he would have preferred the rule to read, “When there is machine-generated evidence, you need to establish reliability, expert witness there or expert witness not there,” to avoid leaning toward not having an expert witness.

Nunn, though, thinks Rule 707 would increase reliance only on properly validated machine evidence, and will actually discourage the use of “amateur” AI evidence that can’t withstand proper scrutiny.

What attorneys seem most worried about, though, is that the new rule could spark numerous courtroom disputes over the validity of machine-generated evidence, with lawyers arguing over how AI tools were trained, what prompts were used and whether the tools are biased, among other issues. Barnes & Thornburg partner and artificial intelligence chair Nicholas A. Sarokhanian dubbed these anticipated pretrial evidentiary fights a “trial within the trial,” Barnes & Thornburg’s Carlucci said courts could see “almost discovery on discovery,” and Dietzen said cases could turn into a “battle of tech experts.”

The proposed rule’s final sentence — “This rule does not apply to the output of simple scientific instruments” — is meant to head off some of this legal wrangling by avoiding unnecessary litigation over the output from simple scientific instruments, like thermometers and electronic scales, according to the committee’s notes.

But “that is just going to be a feeding ground for folks to have a great debate on what are simple scientific instruments,” Waxman said.

Whether or not these concerns turn out to be justified, the new rule is a necessary first step for dealing with the increasing use of AI-created evidence, according to experts. But it is just a first step, they said. “It should be seen as establishing a floor, not a ceiling” for dealing with machine-generated output, said Texas A&M’s Nunn.

Rule 707, for instance, leaves several issues — such as access to proprietary source code and constitutional concerns like the right to confront witnesses in criminal cases — unaddressed, Nunn said.

The rule also appears to only apply to evidence that all parties acknowledge was created by AI, and not to evidence when there’s dispute over its origins, so-called deepfakes, according to Grossman.

Rule 707 could still change, though, as a result of public comments, which the Judicial Conference is accepting until Feb. 16, attorneys said. So some of these concerns may still be addressed.

The advisory committee’s 8-1 vote to circulate the rule for public comment “signals real momentum,” according to Nunn, who thinks the chances of Rule 707 being adopted in some form “very close” to the current draft are “quite high.” “I think the rule’s adoption is likely precisely because it is relatively modest,” Nunn said.

Comment: This all seems pretty positive. Concerns that admitting AI will add to costs and create problems during discovery are not really a critique of the rule. It’s not the rule that causes the proof problems – it is AI that necessitates resources ---unless we admit AI evidence without the necessary challenges, and nobody seems to be demanding that.

12. Article discussing the potential use of VR headsets by Jurors, with the author advocating the application of Rule 107.

Mahin Mughal, *Virtually Unheard of: Why U.S. Courts Need Rules for Virtual Reality Evidence*, 26 N.C. J. L. & Tech. 547 (2025):

The proposed factors for FRE Rule 707, which governs machine-generated evidence, should extend to VR and be assessed within a *Daubert* analysis. *While the proposed amendments encompass parts of the Daubert factors and function similarly to Rule 702, they provide clearer, more specific guidelines for the admissibility of these new technologies.*[Emphasis added]

Discussions surrounding Rule 707 emphasize the importance of scrutinizing inputs and outputs to ensure that technologies posing higher risks--like

VR and AI--are reliable and accurate. These amendments underscore concerns of bias, manipulation, and inaccuracy in digital, enhanced evidence and highlight the need for more rigorous evidentiary standards as technology evolves.

The author uses an example from Florida, a state case named State v. Albisu, in which the jurors were given VR headsets of a videotaped police-citizen encounter:

The dispute is whether it was reasonable for Albisu to believe he was going to be harmed. Though it can be argued that VR merely presents existing evidence, it can also be viewed as a tool that enhances existing evidence, due to VR's immersive qualities. This prompts questions: Should VR be treated as simply an illustrative aid? Or, because it provides an enhanced depiction of the evidence, should it be treated as demonstrative evidence? The answer is clear: A VR simulation presents something new to the jury, something beyond a traditional computer animation, beyond testimony, and beyond tangible evidence.

* * *

The December 2024 use of VR in a courtroom signifies the novel use of a technological innovation--one that has the power to shift the current judicial decision-making process. One legal analyst opined that VR use has the potential to entirely eliminate the jury's role in resolving factual disputes. Such weighty concerns indicate the importance of regulating VR: The technology has the power to change how a juror perceives evidence, how they understand a case, and ultimately, how they reach their verdict. Therefore, VR's reliability and authenticity must be carefully examined under the *Daubert* factors-- which, as a flexible standard, should include the factors outlined in the proposed evidentiary rule for machine-generated evidence.

Courts adapt slowly to technological advancements, but VR has already reached the courtroom--and its presence will only grow. This technology poses legitimate risks that will only increase if courts fail to respond. This Note analyzes a VR simulation under the *Daubert* factors because those factors apply a higher level of review to digital evidence. The *Daubert* factors are, of course, relevant in determining the reliability and authenticity of VR evidence, but courts should also consider adopting rules specific to VR.

VR should be viewed as an entirely new technology: Unlike any technology used in courtrooms before, VR transports a factfinder to the crime scene, allowing them to see what the defendant saw at every angle. VR's unique power necessitates strict guidelines for its admissibility in the courtroom.

Comment: VR would certainly be “machine-generated” evidence and it involves generative AI and so would be covered by Rule 707. Whether anything needs to be said about VR specifically, for example in a Committee Note, is an open question. The concern is

that the more specific the note, the more likely it is to be rendered obsolete by technological developments.

13. *Article about machine-learning in forensics, and commenting particularly on inexplicability.*

Stacey et. al., *A Responsible Artificial Intelligence Framework for Forensic Science*, Forensic Science International 375 (August, 2025):

Artificial Intelligence (AI) is a broad term ranging from traditional machine learning prediction methods to Artificial Generative Intelligence. The Stanford University Center for Human-Centric Artificial Intelligence describes AI as the use of a computer to model intelligent behavior by learning and performing techniques to solve problems and achieve goals with minimal human intervention. The development and integration of AI systems and automated workflows (AI enabled workflows) in forensic science is a rapidly evolving area. The latest developments in AI predictive modelling have enhanced various aspects of forensic science including image and video processing, 3D crime scene reconstruction and large-scale multi-case data analysis. Examples of AI techniques with applications in forensic science are:

- Prediction of Chronological Age using epigenetic markers.
- Identification of paper cup origin.
- Geospatial clustering of crime.
- Synthetic crime scene generation using deep generative networks.
- Presumptive tests.
- Deepfake detection.
- Recommender for photo lineup fairness.
- Predict fatal drug overdose from autopsy narrative text.
- Robotic system for multimodal forensics.

* * * The benefits of AI systems and enabled workflows allow for the ability to gain insights from large amounts of data and efficiently and effectively carry out analysis. However, the risks associated with AI projects that are not well designed or implemented are of major concern and failings of AI systems have been well publicized. * * * The opportunities offered by AI models in enhancing forensic science services come with an obligation to ensure that the results obtained are understandable, impartial, and trustworthy. The outcomes from forensic-specific AI methods and applications could be used in criminal justice systems, therefore these methods and the results obtained from them must pass exacting standards of scientific rigor.

[The authors consider the problem of explainability:]

Explainability, and the related interpretability, is a key principle which must be considered when developing AI models for decision-making solutions. The

state-of-the-art machine learning models, though effective, can be complex and their underlying behavior may not be fully understood. This complexity leads to the treatment of their inner workings as if it is carried out inside a sealed box. * * * The purpose of explainability is to answer questions about the decision making, enabling users to understand the rationale behind their outputs with a focus on why a decision was made. Enabling comprehension of the explainability of the model may require the information to be tailored to different levels of expertise depending on the audience.

[There are] three modes, denoted as white, gray, and black boxes, to describe the ability of an AI system to be interrogated to explain how a classification is determined. White box access are AI systems where the source code is available and the way the model works can be explained. The term grey box is used where access to source code is available but only partially explains the model. A grey box system may also be where an operator can observe interactions with resources such as memory but is unable to access the source code directly. Black box tools are where either only outputs are accessible from arbitrary inputs or the architecture of the algorithm makes it impossible to understand the model even when source code is available. Many models are also only commercially available, meaning that the model architecture and the data used are not accessible at all. * * * Simpler AI models are typically easier to provide an explanation of their process and inner workings whereas models with significantly more complexity may provide higher performance but be more challenging to explain. * * * AI models that adopt a ‘black box’ approach may raise concerns about constitutional rights and public safety as biases in the data used to train the model are hidden from the end user (for example facial recognition technology).

The development of grey box and white box systems will be critical for the on-going acceptance of AI workflows and the trust in their outputs. Forensic results are used to decide the fate of individuals, so it is of vital importance to be able to explain the outcome generated by the models. White box options may not always be possible, especially where complex systems and large volumes of data are involved. *Where black box models are developed, concerns about their inner workings can be addressed and an AI model might be sufficiently explained through vigorous testing of outputs or validation exercises. In this situation, confidence that the model output is repeatable and reproducible is an acceptable alternative to explainability even though the algorithm remains difficult to explain.* An analogy * * * is where the court accepts the reliability of results generated by a complex analytical instrument where sufficient testing and validation of the instrument has been conducted, without necessarily understanding the inner workings of the device. [Emphasis added]

[The authors assert that the preferred practice is to have expert testimony accompanying the AI in court.]

Previous judgements have indicated a preference for a human expert with specialized knowledge to be able to provide a sound basis for the conclusions drawn for the jury to trust the information provided. One approach to managing these challenges is to include one or more human(s)-in-the-loop, which is considered a best practice in AI workflows by some. * * * For forensic cases, where justice outcomes can be severely impacted, it is a good practice that human oversight is always maintained. Automatically detecting sperm cells using AI on an optical microscope is an example where, though the application is useful, it still requires an expert to validate the results. Even a single false negative or false positive would be unacceptable in this case.

Comments: (1) As AI comes to forensics, the need to regulate machine learning becomes even more important. Hence the timing for Rule 707 seems right. (2) This is another piece about the importance of explicability. And it's another voice positing a substitute for explicability ---validating the system by testing the accuracy of outputs.

14. Another Article about the Use of AI in Forensics.

Johns Hopkins University, *The Future of Forensics: How AI Can Transform Investigations*, August 25, 2025:

Forensics experts say AI can be deployed similarly to the way other sectors are using it: to try to identify patterns and use predictive models to improve processes and reduce uncertainty. This can be applied across the forensics lifecycle to help labs monitor the way they handle evidence, creating more transparency and accountability around those decisions * * *.

1. Resource allocation

Lab managers, for example, can use predictive modeling on past case data to estimate how long each case will take based on its characteristics. With this information, they can better understand the staffing and equipment needs of each case. * * *

2. Case and evidence prioritization

As crime labs face substantial backlogs and growing caseloads of varying difficulty, lab directors see an opportunity to leverage machine learning to automatically scan and organize cases by complexity level and evidence priority based on historical data. The initial sorting can support faster turnaround times.

Similarly, a machine learning model could analyze past evidence types and case outcomes to rank the potential usefulness of incoming evidence, helping forensic labs prioritize which types to test first.

However, all of these potential AI applications come with high risks—such as important evidence being misclassified as not worth testing. These can have life-or-death consequences for defendants and could lead to failures to hold people accountable for crimes. For these reasons, experts stressed that any AI system would need to have proven reliability and robustness before it is deployed.

3. More cohesive intelligence

AI has the potential to synthesize results from forensic laboratories, which often produce findings from many kinds of evidence, such as DNA, latent prints, trace evidence. Based on those findings, AI can produce insights, prioritize leads, and suggest potential next steps for investigators using pattern recognition and inference.

4. Human verification as a required guardrail for AI in forensics

While NIST has defined the characteristics of trustworthy AI systems, experts say that the tech still requires careful human oversight, especially as forensic scientists seek to acclimate jurors, judges, and analysts in the courtroom to AI-supported forensic analysis.

Michael Majurski, research computer scientist at NIST, emphasized the need to double-check generative systems' answers since they're always based on the context provided to them.

"You should view generative systems, like an LLM, more as a witness you're putting on the stand that has no reputation and amnesia," he said. "What it says now in this moment has no bearing on what it said in the past, and so there's no way to trust its history of a track record."

* * * As the field of forensics continues to build consensus around needs for testing AI systems and guidance for AI use, it'll also need to address a separate proficiency gap, Majurski added.

Comment: Again, the need for regulating machine-learning is ratcheted up in light of the fact that forensic evidence is being managed by AI.

B. Cases

1. Facial Recognition Issues. Johnson v. State of Maryland, 2025 WL 2237582 (Md. App. August 6, 2025:

The defendant's conviction was reversed because his identification as the perpetrator was based almost exclusively on the use of facial recognition technology, and the government provided him no information whatsoever about how the program worked, or even which program was used. The government argued that there was no harm, because it never introduced the facial recognition report at trial. But the court found that this was of no moment, because the "the FRT

generated Mr. Johnson’s identity from the primary source store video and became the source—the fruit-bearing tree, as it were—of everything that flowed from it.”

The court closed with a concern about the reliability of facial recognition technology, emphasizing the need that it be vetted before trial:

There is ample reason to question the reliability of evidence generated by FRT and artificial intelligence (“AI”) more broadly, and we would send exactly the wrong message if we allowed the State to rely on an FRT-generated identification without accountability. FRT has produced unreliable results in multiple instances across the country, including here in Maryland. In 2022, Alonzo Sawyer was arrested after a facial recognition program identified him as the perpetrator of an assault. * * * The true perpetrator was seven inches shorter and twenty years younger than Mr. Sawyer, and Mr. Sawyer spent nine days in jail before the error was fixed. According to the Innocence Project, at least six others (as of February 2024) had been accused of crimes wrongfully due to misidentification through FRT. Alyxaundria Sanford, *Artificial Intelligence Is Putting Innocent People at Risk of Being Incarcerated*, Innocence Project, (Feb. 14, 2024). Our courts must, and will, recognize the power and opportunity AI tools can offer. But the very real prospect that AI could hallucinate evidence, as it does text and citations when it can’t find an answer, places all the greater imperative on allowing FRT- and AI-generated evidence to be tested appropriately, and we cannot give the State a pass here where it failed even to identify the technology it used to identify the suspect it pursued and prosecuted.

Comment: Vetting is precisely what Rule 707 would require for a report offered on its own, without an expert.

2. Admission of facial recognition technology match: *State v. Deloney*, 2025 WL 1911860 (Ohio App. 2025):

In this criminal prosecution for murder and aggravated robbery, a facial recognition match was offered against the defendant at his trial. Here is the description provided by the appellate court:

Officer Steven Alexander, a criminalist with the Cincinnati Police Department, testified that, as he was assisting Officer Stallcup in collecting surveillance footage, he obtained still images of sufficient quality to run through facial-recognition software. Alexander testified that he did so, and that the software yielded a match: John Deloney.

On appeal, the defendant argued that it was error to admit the facial recognition match. The court found it unnecessary to decide admissibility, because any error was harmless.

Comment: If Rule 707 were applicable, it seems unlikely that the testimony would be admissible. The officer, while described as a “criminalist,” does not appear to have had

expertise in facial recognition technology. He did not appear to be designated as an expert. So what you had was essentially the report itself as evidence, without any foundation provided as to the reliability of the report, and with no indication of how facial recognition works. That is especially problematic when it comes to FRT, which has been widely determined to have reliability problems, at least in certain circumstances: for example, a FRT result can be unreliable when the initial photo is blurred or corrupted (error rates of up to 20% have been reported); when the database for comparison is unrepresentative; and where human analysis is required (as it is when the machine reports back multiple matches). FRT is often deficient at identifying people of color, women, elders, and children. One survey study found that Black people were 100 times more likely to be misidentified than white people. Marcus Smith & Monique Mann, *Facial Recognition Technology & Potential for Bias and Discrimination in The Cambridge Handbook of Facial Recognition in the Modern State* 87, 91 (2024).

In sum, Rule 707 will have positive impact where FRT results are offered as evidence at trial.

3. Class action certified on a claim that use of machine learning in hiring led to discrimination against older applicants: *Mobley v. Workday, Inc.*, 2025 WL 1424347 (N.D. Ca. May 16, 2025):

Machine learning is used by many companies to determine the qualifications and potential of applicants. In this case, a class was certified in a case alleging that the machine learning led to decisions that discriminated against older applicants. The machine learning tool is described in the complaint as follows:

Workday provides a platform on the customer’s website to collect, process, and screen job applications. Workday’s website states that it can “reduce time to hire by automatically dispositioning or moving candidates forward in the recruiting process.” Workday allegedly “embeds artificial intelligence ... into its algorithmic decision-making tools, enabling these applications to make hiring decisions.” Workday’s applicant screening tools allegedly integrate “pymetrics” that “use neuroscience data and AI,” in combination with existing employee referrals and recommendations. * * * [T]hese tools “determine whether an employer should accept or reject an application” and are designed in a manner that reflects employer biases and relies on biased training data. Mobley alleges that Workday’s AI recommendation system can score, sort, rank, or screen an applicant and provide that data to the employer. In many cases, an applicant can advance in the hiring process only if they get past Workday’s screening algorithms.

* * * The first [machine learning] tool, Candidate Skills Match (“CSM”), operates within a subscription service called “Workday Recruiting” to “extract[] skills in the employer’s job posting” and the applicant’s materials “and determine the extent to which the applicant’s skills match the role to which they applied. The results of CSM are reported [to the employer] as ‘strong,’ ‘good,’ ‘fair,’ ‘low,’ ‘pending,’ and ‘unable to score.’ “ The second tool, Workday Assessment

Connector (“WAC”) is alleged to use machine learning to “observe that a client-employer disfavors certain candidates who are members of a protected class, [and] decrease the rate at which it recommends those candidates.”

Comment: As often stated, machine learning can reach biased results, depending on the databases and algorithms used. This case provides a good example of how machine learning will be coming to the courts. As far as Evidence Rules go, admissibility of evidence of machine learning is inevitable in a case like this --- the reliability of the machine learning system is what the case is about. Admissibility of how that machine was prepared, and whether there are any biases, will be reviewed under general provisions --- Rule 403, hearsay, and Rule 702 if an expert testifies. It seems highly unlikely, for example, that a defendant would want to admit machine learning reports, without any expert, in an attempt to prove that that machine learning was unbiased.

II. Machine Learning and Proposed Rule 707

A. Background on Machine Learning

Machine learning is a subfield of artificial intelligence, which is broadly defined as the capability of a machine to imitate intelligent human behavior. Artificial intelligence systems are used to perform complex tasks in a way that is similar to how humans solve problems. Probably the most famous example of machine learning is ChatGPT. Other examples include probabilistic genotyping in DNA testing, facial recognition technology, programs designed to alter audios and videos to provide a different and hopefully better perspective, Virtual Reality headsets, self-driving cars, and predictive coding to determine whether electronic information is subject to discovery.

Machine learning starts with data — numbers, photos, or text, such as bank transactions, pictures of people, sentencing records, repair records, time series data from sensors, x-rays, MRI’s, and sales reports. The data is gathered and prepared to be used as training data --- the information the machine learning model will be trained on. The more data, the wider the scope of the data, the better (generally) is the output of the machine learning. Programmers choose a machine learning model to use, supply the data, and let the computer model train itself to find patterns or make predictions. Over time the human programmer can also adjust the model, including changing its parameters or adding to the database, to help push it toward more accurate results. The result is a model that can be used going forward with different sets of data.

Machine learning can have three distinct functions. A machine learning system can be *descriptive*, meaning that the system uses the data to explain what happened (like the “AI Overview” that pops up in Google searches); *predictive*, meaning the system uses the data to predict a result (like predictive coding in discovery, or a prediction of whether a prospective debtor is likely to default on a loan); or *prescriptive*, meaning the system will use the data to make suggestions about what action to take (like Netflix figuring out what you want to watch next).

The reliability of a machine learning system varies depending on the input the machine receives from humans. One possibility is *supervised* machine learning, where the models are

trained with labeled data sets, which allow the models to learn and grow more accurate over time. For example, a machine can be fed pictures of lions and other things, all labelled by humans, and the machine would learn ways to identify pictures of lions on its own. Supervised machine learning is the most common type used today.

In an unsupervised machine learning system, a program looks for patterns in unlabeled data. Unsupervised machine learning can find patterns or trends that people aren't explicitly looking for. For example, an unsupervised machine learning program could look through online sales data and identify different types of purchases or clients.

Reinforcement machine learning trains machines through trial and error to take the best action by establishing a reward system. For example, autonomous vehicles can be trained to drive by telling the machine when it made the right decisions, which helps it learn over time what actions it should take.

Important Factors Affecting the Reliability of the Product of Machine Learning

The materials in Section 1 show that there are several important considerations that must be taken into account in determining whether machine learning will reach a reliable result:

1. Explainability

As discussed above, a major area of concern is what some experts call explainability, or the ability to understand what the machine learning models are doing and how they make decisions. Machine learning systems can be fooled and undermined, or just fail on certain tasks, even those tasks that humans can perform easily. An understanding of how the models come to their conclusion can help spot errors in results. For example, in one case an algorithm examined X-rays, but it did so by correlating results with the machines that were used. But it turns out that developing countries usually have older machines. So the algorithm concluded that if the data came from an older machine, the patient was more likely to have a disease associated with developing countries (such as tuberculosis). That is correct information, but not helpful, and not the information that the developers were seeking.

Unfortunately, as discussed in a couple of articles in Part One, some machine learning can proceed to the point where no human can explain how it operates, how it comes to the conclusions it does. Many have argued that if the process cannot be explained, if it really is a black box, then the result should not be admissible. That conclusion seems properly grounded in Rule 702. Rule 702 requires the court to make a finding of reliability by a preponderance of the evidence, and that is difficult if not impossible to do with a black box process. As discussed above, an analogous problem arises with experience-based experts, and courts do not allow such experts to testify on the basis of their experience alone, without any explanation of how they came to their conclusion. [Whether the problem of inexplicability should be addressed in the Committee Note to Rule 707 is discussed below.]

2. *Bias*

Machines are trained by humans, and human biases can be incorporated into algorithms — if biased information, or data that reflects existing inequities, is fed to a machine learning program, the program will learn to replicate it and perpetuate forms of discrimination. Article #4 set forth in Part One describes the forms of bias that can lead to bad results from machine learning. A famous example of this was a program that sought to learn how to be a person from the internet. Within a day it was taken down because the program became crazy and racist.

3. *Input Deficiencies*

If the data entered into the system is deficient or flawed, the ultimate result will be tainted. For example, the validity of facial recognition is dependent on the database of pictures entered into the system. Such defects in databases have accounted for the fact that errors in facial recognition are higher with respect to women of color. Similarly, a program making predictions of the probability of recidivism will not be accurate unless it takes account of the fact that some crimes are more often investigated and prosecuted than others. And Amazon abandoned an AI employment tool after three years of use because it was based on ten-year data favoring male applicants, and ended up perpetuating the skewed workforce.

4. *Function Creep*

Sometimes machine learning programs have been applied to solve problems that they were not designed to solve. That is, the algorithm reached reliable results in doing one thing, but it failed when applied to an unrelated problem. An example is *Washington v. Puloka*, No. 21-1-04851-2 (Super. Ct. Kings Co. Wash. 2024). The defendant wanted to present a video that was AI-enhanced. The source video had “motion blur” and the defense expert used a Topaz Labs AI program to increase its resolution, add sharpness and definition, and smooth out the edges of the video images. But Topaz was not developed for adding sharpness and definition while retaining the original images. Its purpose was to allow the operator to alter the video, by creating “false image detail.” It was valid for that purpose. But not for the purpose of enhancing a video without changing it. The court therefore found it unreliable under *Frye*, as Washington is a *Frye* jurisdiction.

Another example of function creep involves the risk-assessment software COMPAS (Correctional Offender Management Profiling for Alternative Sanctions), which was used to make sentencing recommendations, even though it wasn’t designed for that – it was originally designed to provide insight into the types of treatment (e.g., drug or mental health treatment) an offender might need. It turned out that COMPAS was twice as likely to classify black defendants as high-risk.

5. *Source Codes*

There may be flaws in the source code of the machine learning system, which of course will mean that the output is unsound. Daniel Seng, in *Artificial Intelligence and Evidence*, 33 Singapore Law Journal 241 (2024), notes the “brouhaha” involving breathalyzers, where defense

lawyers sought inspection of their codes and were rebuffed, until discovery was granted in a particular case and it was determined that there were calibration and calculation errors in the coding of the machines that resulted in results that were 20% to 40% too high. He also notes coding errors discovered by adversaries in cases involving Toyotas that cause sudden acceleration, and in the environmental sensors in Uber self-drive cars. Further, Article #4, above, stresses the importance of reviewing source codes, which are prone to human error, in determining whether machine learning is reaching reliable results.

One question involving source codes, discussed in prior memos, is whether the opponent is entitled to discovery of those codes. Seng concludes that it is important to provide disclosure of source codes, and that concerns about trade secrets can be handled by protective orders. Grossman and Grimm have made the same point.

The Committee has determined that whether an opponent is entitled to source codes presents a question of discovery in the first instance, and not evidence. The Criminal Rules and Civil Rules Committees have taken the source codes question under their advisement, though it is fair to state that no proposal from either Committee is imminent. There is a paragraph in the Committee Note to proposed Rule 707 stating that discovery issues can be treated under the same rules applicable to expert testimony.

B. What is the Evidentiary Problem Raised by Machine Learning?

Machine learning output could come to court in at least four ways:

1. It could be substantively important because some party relied on machine learning to reach a conclusion that is in dispute (e.g, fired the plaintiff). *See Mobley v. Workday, Inc.*, 2025 WL 1424347 (N.D. Ca. May 16, 2025), discussed above, where the substantive issue is whether the machine learning program was biased in making hiring recommendations;

2. It could be used by experts to assist them in reaching a conclusion (as in a case discussed in previous memos, where Microsoft Copilot was used by the expert to check the expert's assessments, or where probabilistic genotyping is used to assist a DNA expert's determinations);

3. It could be used (either with an expert or not) to enhance video and audio presentations; and

4. A party might seek to enter the machine product directly into evidence as proof of a fact --- such as, for example, a report on facial recognition submitted in a copyright case.

If the case is about the use of machine learning, as in example 1, it would seem that the basic rules of evidence are applicable. If someone is run over by a self-driving Tesla, then any evidence about the algorithms, biases, etc. would clearly be proveable at trial subject to standard evidentiary principles.

If the machine learning is, instead, used as the basis of expert testimony, the governing evidentiary principles would be derived from Rule 702. Simply put, the expert’s opinion will not be reliable if the underlying machine learning is not reliable.

If machine learning is used for enhancement of video and audio, and an expert is presented to validate the process, again Rule 702 would be applicable.

But where the product of machine learning is entered into evidence without the accompaniment of an expert, there is a problem. The concern is, of course, that the product is unreliable, but in the absence of an expert witness, Rule 702 is not directly applicable. There is essentially a gap in the Rules in regulating reliability of machine-generated evidence unaccompanied by an expert witness. That is why the Committee has approved proposed Rule 707.

It is critical to note that the evidentiary issues of machine learning (as opposed to deepfakes) do not lie in authentication. Generally, the product of machine learning is what the proponent says it is (e.g., a report based on probabilistic genotyping, or a video enhanced by use of a computer program). That is what the proponent says it is, but the real question is whether it is a reliable account. That is why machine learning problems are best handled in Article 7, while the problem of deepfakes is best handled in Article 9. That fundamental point was emphasized by Professor Imwinkelried in Article #1 above.

C. Proposed Rule 707

Rule 707. Machine-Generated Evidence

When machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court may admit the evidence only if it satisfies the requirements of Rule 702(a)-(d). This rule does not apply to the output of simple scientific instruments.

Committee Note

Expert testimony in modern trials increasingly relies on software- or other machine-based conveyances of information. Machine-generated evidence can involve the use of a computer-based process or system to make predictions or draw inferences from existing data. When a machine draws inferences and makes predictions, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and lack of interpretability of the machine’s process. Where a testifying expert relies on such a method, that method—and the expert’s reliance on it—will be scrutinized under Rule 702. But if machine or software output is presented without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability), Rule 702 is not obviously applicable. Yet it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering machine output directly, where the output would be subject to Rule 702 if rendered as

an opinion by a human expert. Therefore, new Rule 707 provides that if machine output is offered without the accompaniment of an expert, and where the output would be treated as expert testimony if coming from a human expert, its admissibility is subject to the requirements of Rule 702(a)-(d).

The rule applies when machine-generated evidence is entered directly, but also when it is accompanied by lay testimony. For example, the technician who enters a question and prints out the answer might have no expertise on the validity of the output. Rule 707 would require the proponent to make the same kind of showing of reliability as would be required when an expert testifies on the basis of machine-generated information.

If the machine output is the equivalent of expert testimony, it is not enough that it is self-authenticated under Rule 902(13). That rule covers authenticity, but does not assure reliability under the preponderance of the evidence standard applicable to expert testimony.

This rule is not intended to encourage parties to opt for machine-generated evidence over live expert witnesses. Indeed the point of this rule is to provide reliability-based protections when a party chooses to proffer machine-generated evidence instead of a live expert.

It is anticipated that a Rule 707 analysis will usually involve the following, among other things:

- Considering whether the inputs into the process are sufficient for purposes of ensuring the validity of the resulting output. For example, the court should consider whether the training data for a machine learning process is sufficiently representative to render an accurate output for the population involved in the case at hand.
- Considering whether the process has been validated in circumstances sufficiently similar to the case at hand.

The final sentence of the rule is intended to give trial courts sufficient latitude to avoid unnecessary litigation over the output from simple scientific instruments that are relied upon in everyday life. Examples might include the results of a mercury-based thermometer, an electronic scale, or a battery-operated digital thermometer. Moreover, the rule does not apply when the court can take judicial notice that the machine output is reliable. *See* Rule 201.

The Rule 702(b) requirement of sufficient facts and data, as applied to machine-generated evidence, should focus on the information entered into the process or system that leads to the output offered into evidence.

Because Rule 707 applies the requirements of admitting expert testimony under Rule 702 to machine-generated output, the notice principles that would be applicable to expert opinions and reports of examinations and tests should be applied to output offered under this rule.

III. Questions and Comments for Preliminary Discussion

Final decisions on Rule 707 must of course wait until the public comment period is over. This section does, though, raise matters for a preliminary discussion. Some of these matters are raised in the materials set forth in Part One of this memo.

A. Expand Coverage of Rule 707 to Expert Testimony as Well?

A couple of the articles in Part One suggested that Rule 707 should cover machine learning even when an expert testifies. The apparent assumption of that argument is that the reliability principles laid out in Rule 707 are not drafted to be applicable to machine learning that is presented as the basis of or as complimentary to expert testimony.

What this argument misses is that if the machine learning is a basis of or is complementary to the testimony of an expert witness, that machine learning *is* scrutinized for reliability, today, under Rule 702. An expert that is relying upon machine learning must establish by a preponderance that her opinion is based on proper facts or data, a reliable methodology, and reliable application. How can those factors be established if the machine learning leads to an unreliable output? For example, in *Nadell v. Las Vegas Metro. Police Dep't*, 268 F.3d 524 (9th Cir. 2001), an expert testified to the cause of physical injuries relying on a QEEG test (quantitative electroencephalogram). But the court found that the expert testimony was properly excluded under Rule 702, because the QEEG technique was “error prone” and had been questioned in the scientific community. That is to say, an opinion based on faulty machine evidence is itself faulty under Rule 702. See also *Roback v. V.I.P. Transp., Inc.*, 90 F.3d 1207 (7th Cir. 1996) (engineer using a data acquisition system provided a reliable opinion where the system was established as reliable). Compare *United States v. Glassantener*, 990 F.3d 457 (6th Cir. 2021) (expert reliance on a DNA sorting procedure was proper because the procedure was tested and vetted and had a low rate of error; therefore the expert’s testimony was the product of “reliable principles and methods.”).

So it is hard to argue that machine learning that accompanies in some way an expert’s testimony requires inclusion in Rule 707; it’s already covered by Rule 702. Perhaps the argument is that it would simply be better to bring *all* machine learning under a single rule --- that it is simply not efficient to have machine learning regulated under two separate rules, with the applicability dependent on whether an expert is testifying or not. Let’s discuss that point.

In a perfect world it is probably better to have machine learning evidence handled under one rule. If machine learning had been thought about in 1975, perhaps a rule like 707 could have been written to apply to all machine learning. But today, we have Rule 702 as a general rule that applies whenever an expert is testifying. It seems awkward and drastic to carve out one kind of expert from all the other experts that testify in federal courts. A similar argument was made, and rejected, eight years ago when there was a proposal to place all forensic experts in a special rule. The Advisory Committee quickly rejected that proposal, on the ground that it would undermine Rule 702 --- and even more importantly it would be confusing to apply separate standards to some experts. The Committee was concerned that courts and parties would have difficulty navigating what would inevitably be the overlap in reliability concepts in two separate rules.

Nor does it work to cover machine evidence offered on its own under Rule 702. That would at minimum require an amendment to Rule 702, because that rule covers “witnesses.” But amending Rule 702 right now is not ideal because it was just amended in 2024, and constant tinkering with particular rules sends a bad signal to courts and litigants. Moreover, Rule 702 is one of general applicability, and a rule extending coverage to machines is directed to one particular kind of evidence, different than everything else covered. (That was why the Committee rejected special rules governing forensic experts as an addition to Rule 702.) It’s problematic to add machine learning reports to Rule 702 where there is no expert witness testifying.

It’s apparent that if the Committee is going to regulate machine learning output that is not accompanied by expert testimony, the best rulemaking option is a new Rule 707. Importantly, unlike a new rule governing forensic experts, there should be little to no problem of overlapping concepts – because the rule simply absorbs all of the standards of Rule 702.

B. Narrow the Scope of the Rule by Focusing Specifically on Machine Learning?

Committee discussion at the last meeting recognized that the term “machine-generated” covers information that does not really raise a reliability concern. There are a ton of items that fit the definition of “machine” that essentially process information without any of the dangers of machine learning (thinking like a human) discussed above. This was the position of the DOJ in its dissent from proposed Rule 707: it sweeps too broadly. Are we going to be doing *Daubert* hearings for spreadsheets, digital clocks, radar, Google Maps directions?

There is language in the rule that is intended to limit its scope. The last sentence provides:

“This rule does not apply to the output of simple scientific instruments.”

The Committee Note attempts to provide some guidance to limit the scope of Rule 707:

The final sentence of the rule is intended to give trial courts sufficient latitude to avoid unnecessary litigation over the output from simple scientific instruments that are relied upon in everyday life. Examples might include the results of a mercury-based thermometer, an electronic scale, or a battery-operated digital thermometer. Moreover, the rule does not apply when the court can take judicial notice that the machine output is reliable. *See* Rule 201.

Other aspects of the Committee Note focus specifically on the problems of machine learning and certainly can be invoked to indicate that the rule is about machine learning and not machine-generated evidence generally.

The question is whether enough has been done to limit the coverage of the rule. There is a good argument that the above passages, together with the good sense of courts, will mean that the rule will be applied only where it was intended: to machine data that approximates or replicates human thinking. It seems pretty unlikely that *Daubert* hearings for digital thermometers and calculators will sweep the country.

If something more is required to limit the scope of the rule, what should it be? It seems difficult to add or replace language in a way that will properly limit the scope of a rule in a way that is understandable, easy to apply, and not susceptible to being overtaken by technological developments.² It must be remembered that the rule was submitted for public comment precisely because that comment might provide the Committee with other possibilities for narrowing the scope of the rule.

One of the comments in Part One above suggested that the Committee opt for the machine learning alternative draft that was included in the agenda book for the last meeting – and was implicitly rejected by the Committee when it approved the Rule 707 that was issued for public comment. To refresh recollection, here is the draft, and proposed Committee Note, that is more precisely tailored to machine learning:

Draft Alternative --- Machine-Learning

Rule 707. Output of a Process of Machine-Learning

Where the output of a process or system of machine-learning would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702 (a)-(d).

Draft Committee Note

Machine learning is an application of artificial intelligence that is characterized by providing systems the ability to automatically learn and improve on the basis of data or experience, without being explicitly programmed. Machine learning involves artificial intelligence systems that are used to perform complex tasks in a way that is similar to how humans solve problems. Machine-learning systems can make predictions or draw inferences from existing data supplied by humans. When a machine draws inferences and makes predictions, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and lack of interpretability of the machine's process. Where a testifying expert relies on the output of machine learning, that output – and the expert's reliance on it – will be scrutinized under Rule 702. But if machine learning output is presented without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability), Rule 702 is not obviously applicable. Yet it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering machine learning output directly, where the output would be subject to Rule 702 if rendered as an opinion by a human expert. Therefore, new Rule 707 provides that if machine learning output is offered without the accompaniment of an expert, its admissibility is subject to the requirements of Rule 702 (a)-(d).

The rule applies when machine learning evidence is entered directly, but also when it is

² It should be noted that when the DOJ criticized the Rule, it recognized the difficulty of coming up with alternative language that would easily narrow the scope of the rule.

80 accompanied by lay testimony. For example, the technician who enters a question and prints out
81 the answer might have no expertise on the validity of the output. Rule 707 would require the
82 proponent to make the same kind of showing of reliability as would be required when an expert
83 testifies on the basis of machine learning output.

84 The rule is not intended to encourage parties to opt for machine learning output evidence
85 over live expert witnesses. Indeed the point of the rule is to provide reliability-based protections
86 when a party chooses to proffer machine learning evidence instead of a live expert.

87 It is anticipated that a Rule 707 analysis will usually involve the following, among other
88 things:

- 89 • Considering whether the inputs into the process are sufficient for purposes of
90 ensuring the validity of the resulting output. For example, the court should consider
91 whether the training data for a machine learning process is sufficiently representative
92 to render an accurate output for the population involved in the case at hand.
- 93 • Considering whether the process has been validated in circumstances sufficiently
94 similar to the case at hand. For example, if the case at hand involves a DNA mixture
95 of several contributors, likely related to each other, and a low quantity of DNA, the
96 software should be shown to be valid in those circumstances before being admitted.

97 The Rule 702(b) requirement of sufficient facts and data, as applied to machine learning
98 evidence, should focus on the information entered into the process or system that leads to the
99 output offered into evidence.

Reporter's Comment: One possible problem with the above alternative is that it might be *underinclusive*. An algorithm need not necessarily involve machine learning to be the sort of process or system that produces a machine-generated result and that would raise the issues underlying a proposed 707-like rule. For example, blood-alcohol software could be unreliable, breathalyzer software has been found to be unreliable due to flaws in the source code, and other gadgets such as sleep tracking, Fitbit, etc., might be unreliable.

On balance, the risk of overinclusiveness found in Rule 707 may be the lesser risk; sensible courts are not going to conduct expert hearings on simple instruments. The risks of underinclusiveness are possibly greater because the line between a machine-learning process and other algorithmic calculations can be fuzzy, and is likely to become more fuzzy in the future. The current draft draws the line between expert-like conclusions and non-expert-like conclusions. And courts should be pretty good at assessing what would be an expert conclusion if coming from a human witness. But in the end, the Committee may wish to at least think about this machine-learning alternative after all the public comment comes in.

C. Another Limiting Alternative: Change the Coverage of the Rule from “Machine-Generated” Information to “Computer-Generated” Information?

Greg Joseph, who was an original member of the reconstituted Advisory Committee in 1993, suggested at a panel discussion on Rule 707 that the potential coverage of the rule could be properly narrowed if it covered “computer-generated” information rather than “machine-generated” information. [This comment is relevant only if the Committee sticks with the “machine-generated” approach in the rule as issued for public comment. It is not applicable if the Committee decides to direct the text of the rule toward “machine learning” as discussed above.]

The term “computer-generated” is surely narrower than “machine-generated.” “Machine” is defined as “an apparatus using or applying mechanical power and having several parts, each with a definite function and together performing a particular task.” So that term covers everything from fax machines to bulldozers. As the Committee’s major concern about the rule is its possible broad coverage, it would seem that a change to “computer-generated” does narrow the scope of the rule, and properly so. The rule is not concerned with boats, pencil sharpeners, and fax machines --- or if there is any concern, it would be about the AI/computerized part of a machine, and not the machine itself, e.g. a self-driving boat.

Functionally, as applied to Rule 707, the difference between “machine” and “computer” is not that great. The rule covers *information generated* by the machine or computer. It is pretty unlikely that the vast run of machines --- think escalators, backhoes, and vacuum cleaners --- are going to have any *information* that will be offered at a trial; and if they do, it would not be difficult for a court to find that the rule was not intended to cover that information. Nonetheless, “computer” is narrower on its face than “machine” --- and if the rule looks narrower at the start, the concerns about its application to “all machines” is allayed somewhat.

Changing “machine-generated” to “computer-generated” also requires changes in the Committee Note. **Here is what the Rule and Note as issued for public comment would be changed if “computer-generated” was substituted for “machine-generated.”**

Rule 707. Machine-Computer-Generated Evidence

When ~~machine~~-computer-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court may admit the evidence only if it satisfies the requirements of Rule 702(a)-(d). This rule does not apply to the output of simple scientific instruments.

Committee Note

Expert testimony in modern trials increasingly relies on software- or other ~~machine~~ computer-based conveyances of information. ~~Machine-Computer~~-generated evidence can involve the use of a ~~computer-based~~ a sophisticated machine-learning process or system to make predictions or draw inferences from existing data. When a ~~machine~~ computer program draws inferences and makes predictions, and learns in the way that humans do, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and lack of interpretability of the ~~machine’s~~ process. Where a testifying expert relies on such a method, that

method—and the expert’s reliance on it—will be scrutinized under Rule 702. But if ~~machine-or software~~ computerized output is presented without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability), Rule 702 is not obviously applicable. Yet it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering ~~machine~~ a computerized machine-learning output directly, where the output would be subject to Rule 702 if rendered as an opinion by a human expert. Therefore, new Rule 707 provides that if ~~machine~~ a computerized output is offered without the accompaniment of an expert, and where the output would be treated as expert testimony if coming from a human expert, its admissibility is subject to the requirements of Rule 702(a)-(d).

The rule applies when ~~machine-computer~~-generated evidence is entered directly, but also when it is accompanied by lay testimony. For example, the technician who enters a question and prints out the answer might have no expertise on the validity of the output. Rule 707 would require the proponent to make the same kind of showing of reliability as would be required when an expert testifies on the basis of ~~machine-computer~~-generated information.

If the ~~machine~~ output is the equivalent of expert testimony, it is not enough that it is self-authenticated under Rule 902(13). That rule covers authenticity, but does not assure reliability under the preponderance of the evidence standard applicable to expert testimony.

This rule is not intended to encourage parties to opt for ~~machine-generated~~ computerized machine learning evidence over live expert witnesses. Indeed the point of this rule is to provide reliability-based protections when a party chooses to proffer ~~machine-computer~~-generated evidence instead of a live expert.

It is anticipated that a Rule 707 analysis will usually involve the following, among other things:

- Considering whether the inputs into the process are sufficient for purposes of ensuring the validity of the resulting output. For example, the court should consider whether the training data for a machine learning process is sufficiently representative to render an accurate output for the population involved in the case at hand.
- Considering whether the process has been validated in circumstances sufficiently similar to the case at hand.

The final sentence of the rule is intended to give trial courts sufficient latitude to avoid unnecessary litigation over the output from simple scientific instruments that are relied upon in everyday life. Examples might include the results of a mercury-based thermometer, an electronic scale, or a battery-operated digital thermometer. Moreover, the rule does not apply when the court can take judicial notice that the ~~machine-computerized~~ output is reliable. *See* Rule 201.

The Rule 702(b) requirement of sufficient facts and data, as applied to ~~machine~~ computer-generated evidence, should focus on the information entered into the process or system that leads to the output offered into evidence.

153 Because Rule 707 applies the requirements of admitting expert testimony under Rule 702
154 to ~~machine~~ computer-generated output, the notice principles that would be applicable to expert
155 opinions and reports of examinations and tests should be applied to output offered under this
156 rule.

D. Say Something About the Need for Explainability?

As discussed above, some machine learning systems can reach a point where even those who developed the system cannot explain how it reaches the results it does. One would think that the consequence of a lack of explainability would likely be inadmissibility under Rule 702, and therefore under Rule 707. It will certainly be difficult to prove that machine learning is more likely than not reliable if its process can't even be explained.

The courts have encountered this lack of explicability under Rule 702: experts who come to a conclusion solely on the basis of their experience. Under Rule 702, experience-based testimony is not admissible unless the expert can explain plausibly how she came to her conclusion. See the Committee Note to the 2000 amendment to Rule 702 ("If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply taking the expert's word for it."). See, e.g., *United States v. Valencia-Lopez*, 971 F.3d 891 (9th Cir. 2020) (law enforcement expert testimony was erroneously admitted where the expert relied solely on experience but did not explain his methodology and made no effort to link his experience with the opinion he offered.). There is no reason to treat machines differently --- if you can't explain how they came to their conclusions, they have to be excluded, otherwise there is no gatekeeping function at all.

It may be, though, that with respect to machine learning, the problem of inexplicability could be overcome by some *alternative* showing, even though its operation is inexplicable. Most likely that would be a demonstration that the machine learning process actually results in a very low or non-existent rate of error, together with a showing of how the machine has been trained. An analogy would be something like canine drug detection: we don't exactly know how dogs can do that, but we do know how they get trained and what their rate of error is, and so these alerts are admitted upon a proper foundation.

The question for the Committee is whether the problem of inexplicability should be addressed in the Committee Note. Here is a possible addition:

A machine learning process can sometimes develop in such a way that nobody is able to explain how the system has reached a result, because the machine has adapted the ability to program itself. If the process cannot be explained then the court should in most cases find that the proponent has not established more likely than not that the methodology is reliable. As with experience-based testimony, the proponent is required to show how the methodology leads to the conclusion. See Committee Note to the 2000 amendment to Rule 702 ("If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the

conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.”). That said, the proponent of machine learning output may overcome the problem of inexplicability by showing how the machine got trained and establishing, for example through validation studies, that the process leads to a low rate of error.

E. Say Anything About Rule 901(b)(9)?

As discussed above in the article by Professor Imwinkelried, Rule 901(b)(9) is a problematic rule as applied to all machine-generated evidence, including machine learning. Rule 901(b)(9) provides a sufficient showing of authenticity when the proponent provides “[e]vidence describing a process or system and showing that it produces an accurate result.” Essentially what it requires is a description of how the system works -- and a showing of *reliability*.

As Professor Imwinkelried notes, the Rule’s focus on reliability is misplaced --- authenticity is about the item being what you say it is, not about reliability. If someone wants to authenticate an item as being fake (like counterfeit money), a reliability requirement is obviously nonsensical; instead the proponent must make a showing that it is fake money. So, again, Rule 901(b)(9)’s focus on unreliability is misplaced in Article 9. And, equally important, the low standard of proof to satisfy Rule 901(b)(9) makes it a poor tool for regulating machine-learning systems.

In a prior agenda book (Fall, 2024), the Committee considered, and failed to approve, a proposal to add more requirements to Rule 901(b)(9) so that it would provide better regulation of machine learning evidence. The Reporter’s conclusion about that proposal (from Grimm and Grossman) was as follows:

The proposal to amend Rule 901(b)(9) essentially seeks to impose additional reliability guarantees on machine learning outputs. A big problem with adding reliability requirements to *authentication* standards is that you are stuck with the low Rule 104(b) standard. More importantly, *authenticity is not about reliability*. It is about whether the item is what you say it is. If I wanted to admit a document that is probative *because* it is false and unreliable, I would authenticate by showing that it was prepared in an unreliable manner. If I wanted to admit a ChatGPT transmission *because* it was a hallucination, I would not be trying to show a system that leads to reliable results.

When we think of reliability problems inherent in machine learning, the better analog is surely Rule 702. Under Rule 702 the proponent must satisfy a *preponderance* standard. And Rule 702-type principles are obviously pertinent because the jury will treat machine learning output as the equivalent of expert testimony. And those Rule 702-type standards are the ones being applied by courts to machine learning evidence today.³ That Rule 702 analysis works well when there is a live expert testifying to the machine learning output. While Rule 702 refers to “witnesses” and machines are not really witnesses, the solution for

³ See, e.g., *Washington v. Puloka*, No. 21-1-04851-2 (Super. Ct. Kings Co. Wash. 2024) (applying expert reliability requirements to machine learning outputs).

admitting machine-learning evidence without witness accompaniment is to have an independent rule specifically about machine learning that incorporates the reliability requirements of Rule 702. That is, a new Rule 707. Thus, it seems like amending Rule 901(b) is not the optimal solution for machine learning evidence.

So given that Rule 707 has changed the focus of machine learning evidence to Article 7, rather than Article 9, the question is whether anything needs to be done, or said, about Rule 901(b)(9). Professor Imwinkelried suggests that the Committee consider simply abrogating the rule. Here is his analysis (replicated here so you don't have to look back for it):

Neither the text of Rule 104(b) nor the accompanying Advisory Committee Note contains any suggestion that the drafters ever intended that judges would use the 104(b) procedure to decide the admissibility of scientific evidence. However, the reference to “process or system” in the text of Rule 901(b)(9) does carry such a suggestion. In truth, when they pass on scientific evidence, the courts almost never cite Rule 901(b)(9); intuitively, most judges realize that the conditional relevance procedure is simply not a good fit for resolving the admissibility of expert testimony. However, especially since some of the scholarly commentary on AI mentions Rules 104(b) and 901(b)(9), the retention of 901(b)(9) at the very least creates the potential for mischief. A straightforward solution would be repealing Rule 901(b)(9). * * * The existence of Rule 901(b)(9) can result in the application of inappropriate preliminary factfinding procedures. * * * A judge should not have to ignore a seemingly applicable provision to reach a sensible result.

Abrogation might be a solution for the Committee to think about in the future, but it seems to be a radical choice while Rule 707 is out for public comment. Best to wait to see what happens with that rule before dismantling a longstanding rule of authentication. Consideration would have to be given to whether it would negatively impact authentication for the kinds of machines that are *not* covered by Rule 707 (such as electric scales and blood pressure machines).

That said, the question of how Rule 901(b)(9) would interact with Rule 707 will very probably arise. Both rules can be read to apply to machine learning, even though, as Professor Imwinkelried notes, courts have not applied Rule 901(b)(9) to scientific evidence. The answer is that, insofar as there is a concern about the reliability of machine generated evidence, ***enactment of Rule 707 eclipses Rule 901(b)(9)***. This is because Rule 707 requires a showing by a preponderance of the evidence that the machine learning process is reliable. Given the higher standard of proof required for admissibility, there is no reason to even think about Rule 901(b)(9). Put another way, satisfying the low standard of Rule 901(b)(9) might overcome a (misplaced) authenticity challenge. But it will not result in admissibility.

The Committee should consider adding a paragraph to the Committee Note that might help to allay any confusion about the relationship between Rule 707 and Rule 901(b)(9). Here is a possibility:

All questions of the reliability of a machine learning process are now regulated under Rules 702 and 707. Rule 901(b)(9)'s requirement that the process or system “produces an

accurate result” is subsumed by the reliability requirements that must be established by a preponderance of the evidence. under Rule 702 or 707. Given the fact that the threshold requirement for authenticity is significantly lower than that for reliability, it follows that if machine learning is qualified under Rule 701 or 702, then it automatically satisfies the lesser requirements of Rule 901(b)(9). In contrast, satisfying Rule 901(b)(9) does not suffice for admissibility.

TAB III

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Deepfakes and Draft Rule 901(c)
Date: October 1, 2025

Since its meeting in Fall 2023, the Committee has been considering the challenges posed by the development of artificial intelligence (AI) and its possible impact on evidence offered at a trial. The Committee has convened two separate panel discussions to obtain information from experts in the field. The Committee has focused on two separate concerns: 1) The problem of “deepfakes” and how to assure that the Evidence Rules on authenticity will work to prevent hard-to-detect fake video and audio evidence from being admitted at trial; 2) The problem of machine learning and how to assure that machine learning output is reliable, if such evidence is admitted without the testimony of an expert.

Previously the discussions of deepfakes and machine learning were combined in one memo. But as the Committee has discovered, the concerns about machine learning are different from those raised by deepfakes. Specifically, machine learning raises issues of reliability while deepfakes raise issues of authenticity. Moreover, the Committee has decided to make a proposal on machine learning but to hold back on a proposal on deepfakes. Accordingly, these two AI topics are now going to be treated in separate memos.

This memo discusses deepfakes. The memo is in three parts. Part One discusses new developments, articles, etc. since the last Committee meeting. Part Two discusses the problem raised by deepfakes. Part Three discusses draft Rule 901(c) and considers whether the Committee should continue to wait for developments before proposing a rule amendment.

I. New Materials to Consider

A. Developments

1. *The President's AI Action Plan and Deepfakes*

The President issued the Administration's action plan with regard to Artificial Intelligence on July 23, 2025. One part of the plan focuses on deepfakes, and contains a section that specifically calls out the Committee's recent work in developing a possible Rule 901(c) to deal with admissibility questions related to deepfakes. *The section provides as follows:*

Combat Synthetic Media in the Legal System

One risk of AI that has become apparent to many Americans is malicious deepfakes, whether they be audio recordings, videos, or photos. While President Trump has already signed the TAKE IT DOWN Act, which was championed by First Lady Melania Trump and intended to protect against sexually explicit, non-consensual deepfakes, additional action is needed. In particular, AI-generated media may present novel challenges to the legal system. For example, fake evidence could be used to attempt to deny justice to both plaintiffs and defendants. The Administration must give the courts and law enforcement the tools they need to overcome these new challenges.

Recommended Policy Actions

- Led by NIST at DOC, consider developing NIST's Guardians of Forensic Evidence deepfake evaluation program into a formal guideline and a companion voluntary forensic benchmark.
- *Led by the Department of Justice (DOJ), issue guidance to agencies that engage in adjudications to explore adopting a deepfake standard similar to the proposed Federal Rules of Evidence Rule 901(c) under consideration by the Advisory Committee on Evidence Rules.*
- *Led by DOJ's Office of Legal Policy, file formal comments on any proposed deepfake related additions to the Federal Rules of Evidence. [Emphasis added]*

Comment: It has become apparent over the past year that the Committee's efforts on AI are being closely watched by the legal community. One can think it especially heartening that the Committee's efforts are recognized by the Administration as well. It is possible to look at this as an indication from the Administration that the Advisory Committee's draft should be released for public comment.

2. *Legislative Development in Louisiana*

Louisiana House Bill 178, enacted June 11, 2025, provides some procedural regulations regarding deepfakes.

Article 371C of the Code of Civil Procedure provides as follows:

C. An attorney shall exercise reasonable diligence to verify the authenticity of evidence before offering it to the court. If an attorney knew or should have known through the exercise of reasonable diligence that evidence was false or artificially manipulated, the offering of that evidence without disclosure of that fact shall be considered a violation of this Article.

Article 1551(5) adds the following matters to be discussed at pretrial conferences in civil cases:

(5) The authenticity and admissibility of exhibits that a party intends to introduce at trial, including a pretrial ruling on the admissibility of exhibits or the setting of a hearing date as to the admissibility of exhibits.

(a) If a party has reasonable suspicion that an opposing party's exhibits are falsified, including having been generated by artificial intelligence or altered by any means, the party shall raise these concerns at the pretrial conference or at a pretrial hearing on the admissibility of the exhibits.

(b) If a party knows or has reason to know that its exhibits have been falsified, including having been generated by artificial intelligence or altered by any means, the party shall disclose this fact in accordance with Article 371.

(c) Subsubparagraphs (a) and (b) of this Subparagraph shall not apply to demonstrative exhibits.

The Drafter's Comment on 1551(5) provides as follows:

(a) Subparagraph (A)(5) of this Article requires that the parties address at a pretrial conference or hearing the authenticity and admissibility of exhibits that are suspected to have been created, altered, or manipulated. The Article's use of "artificial intelligence" is broad and encompasses the suspected use of "deepfakes". 31 R.S. 14:73:13 defines "deepfake" to mean "any audio or visual media in an electronic format . . . that is created, altered, or digitally manipulated in a manner that would falsely appear to a reasonable observer to be an authentic record of the actual speech or conduct of the individual or replace an individual's likeness with another individual and depicted in the recording." Black's Law Dictionary (12th ed.

2024) defines “deepfake” to mean a “false video, audio recording, or other medium that is generated or manipulated by computer, often using artificial intelligence, with the intent to deceive viewers or listeners.”

Comment: These rules might well be effective. The first provision is really an ethics provision, but it certainly is no harm to emphasize it in a civil rule. The second provision may help to tee up the deepfake question before trial.

But these rules are not Evidence Rules. They don’t govern the admissibility of evidence; they deal with what is to be discussed in a pretrial conference. A rule like 1551(5) might work well together with a Rule 901(c), which allocates burdens of production and proof for deepfake questions. But, again, these Louisiana rules are a better fit for the Civil Rules that they are for the Rules of Evidence.

That said, the development in Louisiana might be the start of state legislation to regulate deepfakes, and some of those efforts are undoubtedly going to constitute changes to Evidence Rules. Query whether the Committee wants to lead that effort, or to follow it.

3. *California Courts’ Task Force on AI*

California’s court system has a Task Force on AI. It is focusing on the use of AI by courts and lawyers, not about the admissibility of evidence. However, the Task Force has established a definition of “generative artificial intelligence” that is similar to that used by the Committee in the draft Committee Note to Rule 901(c). Here is the California definition:

“Generative artificial intelligence” means a computer-based system that uses machine learning or similar techniques to produce new content—such as text, images, audio, video, code, or data visualizations—in response to user inputs. Generative AI systems create content that is not pre-programmed or explicitly retrieved but synthesized based on underlying models trained on large datasets and may include integration with other sources, such as real-time access to proprietary databases.

The Advisory Committee’s definition is as follows:

“Generative artificial intelligence” is used in this rule to cover technology that can produce various types of content, including text, imagery, audio and synthetic data. Generative artificial intelligence creates new content in response to a wide variety of user inputs.

Comment: One can argue that the Advisory Committee’s definition is an improvement as: 1) it is more concise; and 2) it avoids using terms that must themselves be defined, such as “machine learning.”

B. Articles

1. Article advocating rule change to deal with the admissibility of deepfakes, and discussing materials released by the National Center for State Courts.

Esquire Deposition Solutions, *AI-Generated Evidence Calls for Searching Judicial Inquiry*, <https://www.jdsupra.com/legalnews/ai-generated-evidence-calls-for-8651344/>:

[U]nlike the frequent headaches created when generative artificial intelligence is carelessly used to create legal pleadings, the legal challenges posed by deepfake evidence are still largely on the horizon – *not yet a daily reality*. Judges will increasingly need to establish best practices to deal with a *potential* deluge of evidentiary issues. [Emphases added.]

That effort is underway.

The National Center for State Courts, a research and education resource for state court judges and judicial administrators, is working to ensure that, when deepfake evidence arrives in court, judges will be well-equipped to deal with it. To that end, the NCSC recently published two “bench cards” setting out questions that judges should ask whenever AI-generated evidence is proffered for use in legal proceedings.

Helpful AI-Generated Evidence

The first bench card addresses acknowledged AI-generated evidence. Parties offering this type of evidence acknowledge to the court and opposing counsel that it was created by digital technology. This category mostly covers computer-generated demonstrative evidence and other evidence that enhances the factfinder’s ability to understand the case. Into this category fall:

- computer-generated visualizations
- accident reconstructions
- depictions of medical procedures
- crime scene layouts

Also included in the category of acknowledged AI-generated evidence are data analyses and evidence that has been digitally enhanced in some fashion (e.g., photographs that have been enlarged and blurred depictions digitally clarified). Acknowledged AI-generated evidence can also include direct evidence such as biometric identifiers.

The bench card explains that, while potentially helpful, this type of evidence requires heightened scrutiny by the trial court because it may be unreliable or overly persuasive with a jury. The bench card advises judges to consider giving the jury

instructions on how the evidence was created and a reminder that the jury is entitled to weigh the believability of AI-generated evidence just like any other evidence.

Deepfake Evidence

The second bench card addresses the problem of unacknowledged AI-generated evidence. Into this category falls “deepfake” evidence – evidence that has been digitally fabricated in some fashion to depict a false version of reality.

Deepfake evidence, whether offered in court or during a deposition, poses unique challenges that some experts believe are not adequately addressed by current evidence rules. Deepfakes are difficult to detect and authenticate. * * *

Unacknowledged AI-generated evidence, the bench card notes, has a significant potential to create a miscarriage of justice. The bench card advises that, whenever AI-generated evidence is proffered in a legal proceeding, the trial court should consider asking:

- What is the source of this evidence, and how, when, and where was it obtained?
- Can you tell the court who has had custody of this evidence from its creation or capture until now, including sharing or transferring the evidence, and where it has been stored?
- Has this evidence been altered, edited, converted to a different format, or processed in any way since its creation?
- Is there any other data or source that can confirm the authenticity of the evidence?
- Were any forensic tools or methods used to verify the integrity of the evidence?
- Can you provide metadata or other technical information that supports the authenticity of this digital file?
- *Can a qualified expert explain the processes used to handle and verify this digital evidence?* [Emphasis added.]

In some cases, expert testimony might be necessary for the court to reliably assess AI-generated evidence. The NCSC bench card suggests that, if the parties do not identify an expert, the court should consider appointing an expert of its own.

The problem of deepfake evidence is being studied elsewhere in the legal community as well. One approach under consideration in the federal system would be to create a new Rule 901(c) in the Federal Rules of Evidence that would require the proponent of possibly AI-fabricated evidence to demonstrate to the court that it is “more likely than not” authentic. Policymaking efforts regarding deepfake evidence are also underway in New York, California, and Texas. There’s even a suggestion that professional ethics rules should be changed to place a heightened ethical burden on attorneys to refrain from offering deepfake evidence in court.

The message for litigators seems clear. Both the promise and the dangers of computer-generated evidence are on trial judges' radar screen today. Expect that this type of evidence will receive searching – and well-informed – scrutiny by the trial judge prior to admission in court.

Comment: One bench card is for machine learning and the other is for deepfakes. The solution of jury instructions is unlikely to be sufficient unless there is prior scrutiny by the judge into reliability --- as is envisioned by Rule 702 and proposed Rule 707. The article is helpful, though, in laying out the wide array of evidence that is generated by machine learning systems.

As to deepfakes: the list of considerations is helpful, but there is no suggestion that the opponent must provide some foundation before the court has to do a deepfake enquiry. That is a central tenet of the draft Rule 901(c), and it is necessary to avoid a waste of resources every time a video or a photo is proffered.

The questions set forth in the second bench card are taken mainly from Grimm and Grossman. They seem to be very useful. One question for the Committee is whether such a list should be added to the Committee Note to draft Rule 901(c). While these factors are helpful, again, the risk of a heavily detailed note is that it will become outmoded by technological advancements.

2. Article: Discussion on deepfakes, National Center for State Courts, etc.

Cyberjustice Laboratory, *AI Evidence in Jury Trials: Balancing Trust and Skepticism*, <https://www.cyberjustice.ca/2025/08/29/ai-evidence-in-jury-trials-balancing-trust-and-skepticism> (August, 2025):

Artificial intelligence is reshaping the way evidence enters courtrooms. What was once limited to documents, testimony, and forensic reports now includes AI-generated material, from enhanced exhibits to deepfake recordings. The real challenge emerges when juries are asked to weigh such evidence. Jurors bring human judgment, but also human vulnerabilities: a tendency to trust what appears sophisticated, or to grow skeptical after encountering manipulated content.

This new reality raises urgent questions. How should jurors approach AI-generated evidence? What risks come with it? And can the existing rules of evidence keep up?

To explore these challenges, the National Center for State Courts (NCSC) and the Thomson Reuters Institute co-hosted a webinar titled AI Evidence in Jury Trials. Part of the ongoing AI and the Courts series, this thirteenth session examined how AI-generated evidence intersects with jury psychology, rules of authentication, and the broader search for fairness. Rather than speculation, the conversation focused on the immediate dilemmas already confronting courts. Jurors may over-trust or dismiss AI outputs, judges must determine how to authenticate unfamiliar

material, and lawyers remain bound by ethical duties even as technology accelerates. The discussion highlighted the fragile balance between innovation, fairness, and public trust.

* * *

When AI evidence is presented openly and transparently, it can complement expert testimony. Visual reconstructions or AI-assisted exhibits, for instance, may help jurors remember details more clearly, strengthen their understanding of events, and support a more balanced evaluation alongside eyewitness accounts or physical records.

* * * [On the other hand,] deepfakes and unacknowledged AI evidence can distort memory, create unwarranted doubt, or overwhelm jurors. In a domestic violence trial, for instance, a bad actor could take a person’s voice recording and generate audio of them saying something incriminating that they never actually said. Once an AI-generated image or video is introduced, it is notoriously difficult to “unring the bell.” * * *

Jury Psychology and Courtroom Safeguards

Psychological factors play a decisive role in how jurors respond to AI evidence. Research shows that audiovisual material is remembered far more vividly than text, which makes manipulated media especially powerful. This “stickiness” can cause jurors to confuse what they saw in a fabricated video with an actual memory. Another concern is the “Novelty and Authority Effect,” where jurors may place undue trust in technology simply because it feels modern and authoritative. * * *

These psychological risks have already prompted courts to rethink how they guide jurors. Courts are beginning to consider updated jury instructions that explicitly address AI. Draft proposals emphasize reliability, bias, and verification, while cautioning jurors that not everything produced by AI is trustworthy. At the same time, some worry that placing too much emphasis on AI’s risks could make jurors overly distrustful.

One example already developed is a model jury instruction created by retired Justice William Deino using Microsoft Copilot.¹ It warns jurors that AI outputs may be shaped by training data, algorithms, and bias, and instructs them to weigh reliability, credibility, verification, and limitations in the same way they would with any other type of evidence.

Courtroom practices are also beginning to adapt. Proposed safeguards include:

¹ It’s interesting that jury instructions about the dangers of AI were generated by AI.

- Pretrial tutorials to familiarize jurors with AI evidence
- Transparent disclosure when AI tools are used in preparing exhibits
- Jury instructions that include error rate disclosures and clarify the limitations of the tools
- Procedures requiring experts to explain how AI outputs were generated
- Opportunities for jurors to ask questions, allowing judges and lawyers to address confusion in real time

These measures aim to ensure that jurors, the “engine of the process,” are protected from undue influence while preserving their critical role in deliberation.

Evidence Rules Under Pressure

The U.S. Federal Rules of Evidence provide an important lens for examining AI-generated content. Rules such as 901 (authentication) and 902 (self-authenticating documents) rest on the assumption that records presented in court are reliable. When AI can fabricate realistic documents, videos, or voices, that assumption begins to falter.

These challenges are not just theoretical. An AI-altered document filed with a public office, for example, could later be admitted as an official record under Rule 902 even if it was false from the beginning. Similarly, proposals for a new Rule 707, now open for public comment, suggest holding machine-generated evidence to the same reliability standards as expert testimony under Rule 702.

And the difficulties do not stop there. The more complex challenge arises with unacknowledged AI evidence, such as deepfakes. A potential new Rule 901(c) has been debated, which would set out procedures when the authenticity of AI-generated content is disputed or fabricated. In such cases, Rule 104(b) on conditional relevance may also come into play, determining whether evidence is sufficiently supported to be presented to a jury. Some proposals argue for weighing probative against prejudicial value under Rule 403, while others suggest shifting the decision from juries to judges. Yet even judges, without specialized expertise, may not be better equipped to determine authenticity.

These debates make one point clear. Courts should not simply follow the momentum of new technologies. They must remain cautious and deliberative, ensuring that any reform is grounded in evidence, just as they have historically done when facing systemic challenges like language access.

Experts, Ethics, and Access to Justice

Technical hurdles make it extremely difficult to distinguish real from fabricated AI evidence. Watermarks can be erased without a trace, automated detection tools are unreliable, and even experts can only speak in terms of probability. Automated tools often fall short because generator and discriminator

models evolve together so quickly that errors become harder to detect. These challenges suggest that courts may need new models of expertise. One proposal is to establish panels of court-appointed AI experts, similar to the way courts already appoint specialists in family law or competency hearings.

Beyond expertise, ethical obligations are just as important. Lawyers remain responsible for ensuring that any evidence they submit is authentic, regardless of whether AI was involved in its creation. Several state bars have already issued guidelines stressing competence, diligence, and disclosure. In California, for example, the Judicial Council adopted specific rules on AI ethics in July 2023, which took effect on September 1. Commercial tools like Lexis have also begun providing resources to help lawyers track ethical requirements across different states. * * *

Finally, equity concerns highlight another challenge. Self-represented litigants, who already face structural disadvantages, are unlikely to have the same resources as prosecutors or large law firms to contest AI-manipulated evidence. Without safeguards, disparities in technical capacity could deepen inequities in the courtroom.

Looking Ahead: Preserving Trust in Jury Trials

Despite the challenges, trust in the jury system remains strong. Many judges emphasize the capacity of jurors to rise to their “sacred duty” when they are properly guided. Practical tools such as clear instructions, opportunities for questions, and close judicial oversight can help jurors navigate the complexity of AI evidence. At the same time, the law will inevitably lag behind technology. Courts must therefore remain flexible, cautious, and proactive. The path forward lies in combining ethical safeguards, technical expertise, and transparent processes. AI can enhance justice, but only if it is consistently treated as a tool under human control and never as a substitute for human judgment. * * *

* * * These possibilities point to a broader lesson. The future of AI in the courtroom will not be determined by technology alone, but by the human systems that shape its use. Judges, lawyers, and jurors must adapt together to safeguard fairness, preserve public trust, and ensure that justice remains at the heart of every trial.

3. Article: Another article about the perils of deepfakes, and the attempts to regulate them.

Complex Discovery Staff, *Courts at the Crossroads: Confronting AI-Generated Evidence in the Age of Deepfakes:*

When a high school principal in Maryland was accused of making racist and antisemitic comments, the fallout was swift and severe. The recording quickly

spread across social media, prompting outrage from parents and students, a torrent of threats, and his subsequent removal from his position. It would later emerge that the voice in the viral clip wasn't his—it was an AI-generated deepfake. **(Comment: Note that this was not an instance of a deepfake being offered at trial.)**

This scenario is no longer unusual. Across industries and jurisdictions, synthetic media created by generative artificial intelligence is disrupting how we identify, interpret, and admit evidence. Deepfakes—convincing, falsified digital content—are increasingly being used not only for political misinformation and social manipulation but now, directly in courtrooms. In their comprehensive article, “Judicial Approaches to Acknowledged and Unacknowledged AI-Generated Evidence,” published in the *Columbia Science & Technology Law Review*, Maura R. Grossman and Hon. Paul W. Grimm (ret.) outline an incisive framework for understanding how U.S. courts are beginning to address the challenges posed by AI-generated evidence.

The authors distinguish two categories of AI-influenced content. First, *acknowledged* AI-generated evidence refers to instances where both parties in litigation agree that the content was created or processed using AI. This might include voice cloning, video enhancement, or algorithmic analysis. Second is *unacknowledged* AI-generated evidence—content presented as real but contested as synthetic. It is in this second category, often involving deepfakes, where the most disruptive risks emerge.

* * * Grossman and Grimm examine how the Federal Rules of Evidence, although robust in many respects, are showing signs of strain. Rule 901 requires only a minimal threshold for authentication—typically, testimony that a witness recognizes the voice or content. However, that bar is too low in a world where deepfake audio can be generated using short samples from public sources, such as YouTube, and passed off as real to even those who know the voice well.

* * * To address these vulnerabilities, the authors recommend targeted reforms. First, they suggest revising Rule 901(b)(9) to replace the ambiguous term “accuracy” with scientifically grounded standards of “validity” and “reliability.” The updated rule would require the party introducing AI-generated evidence to disclose how the evidence was created, including the training data and algorithms used, and demonstrate that the process yields valid and reliable results in context.

Second, they propose a new Rule 901(c) tailored specifically for unacknowledged AI-generated evidence. Under this rule, judges would be authorized to exclude evidence if its prejudicial impact merely outweighs, not substantially outweighs, its probative value. * * * Rather than relying solely on jury assessment under current authenticity rules, the judge would act as a more active gatekeeper in evaluating both the origin and effect of disputed media.

Recognizing that rulemaking is a slow process, Grossman and Grimm also offer interim practices courts can adopt today. These include raising synthetic content concerns during discovery, compelling the production of metadata and AI system documentation, and limiting prejudicial impact through motions in limine. Judges should be prepared to issue protective orders for proprietary AI technologies and require qualified expert testimony to explain how content was created or manipulated. Expert vetting becomes even more essential as AI tools evolve and operate increasingly as black-box systems, making transparency and explanation more difficult. * * *

This challenge is not merely one of technological sophistication—it is a human problem. Jurors and judges rely on their senses, experience, and reasoning to weigh evidence. AI-generated content, when indistinguishable from reality, undermines all three of these. What Grossman and Grimm propose is not a radical departure but a recalibration of existing rules to address the new informational landscape. Their framework emphasizes scientific clarity, judicial caution, and procedural transparency.

The justice system has long adapted to new forms of evidence, including DNA, email, and surveillance footage. But the shift to synthetic media is different. It blurs the boundary between real and fake so effectively that even experts can be misled. In response, the legal community must ensure its evidentiary standards are no longer built on assumptions about the credibility of sight and sound.

Grossman and Grimm’s article arrives at a critical time. Courts must prepare not just for more AI evidence but for the distortion it may bring. A future where anyone can be impersonated or discredited through AI is no longer hypothetical. If evidentiary rules remain static, the integrity of trials themselves could be compromised.

To maintain public trust and uphold the fact-finding mission of litigation, the judiciary must evolve. This article offers not only a diagnosis of the current risks but a principled, actionable path forward.

Comment: The author read the latest article by Grimm and Grossman – previously reviewed by the Committee – and he apparently liked it very much. Basically he summarizes the article. But for reasons previously discussed, the problem of unacknowledged AI is best dealt with by the burden-shifting called for under the Committee’s draft of Rule 901(c).

4. Another (overheated) article about the perils of deepfakes and efforts to control them.

Bateman, *AI and Deepfakes Crisis: AI Disorder in the Courtroom*, July 10, 2025:

* * *

There is a looming challenge for courts everywhere: How do we authenticate evidence when AI can convincingly manipulate any digital content?

Scholars have begged the advisory committee for a decade to tighten the gate; the committee keeps taking polite notes and postponing action. Soon it won't matter whether a video is genuine, because every party will assert the right to call it fake, or to call it partly fake, or to call an almost-identical replacement more accurate. At that point, authentication ceases to be a predicate question and becomes the whole trial.

With sophisticated generative AI, a video can depict a person saying or doing something they never did, in a manner virtually indistinguishable from genuine recording. Unacknowledged AI-generated evidence — fake media presented as real — poses a serious threat to the fact-finding process. Courts fear scenarios where one side introduces a damning video of the opponent that's actually a fabrication.

Conversely, even authentic footage might be falsely challenged as a “deepfake” by the opposing side, sowing doubt and confusion about reality. This has been termed the “liar's dividend” of deepfakes — the mere existence of the technology allows liars to continuously claim real evidence is fake.

Legal experts and rulemakers are actively grappling with this. The issue of deepfake evidence has reached the U.S. Judicial Conference's Advisory Committee on Evidence Rules. In 2024, the committee considered several proposals from scholars and jurists to amend the Federal Rules to better address AI-generated evidence.

One proposal, by Professor Rebecca Delfino, suggested updating Rule 901 to require a more structured foundation for digital audiovisual evidence, possibly including expert analysis or technological verification of authenticity. Another, by Judge Paul Grimm and Professor Maura Grossman, urged a new framework that would remove the authenticity question from the jury in cases of suspected deepfake and require judges to make a determination in a pretrial hearing.

Outside of rule changes, practical tools and guidelines are emerging. The National Center for State Courts, together with the Thomson Reuters Institute, recently published bench cards for judges on handling AI-generated evidence.

These guides help judges by providing structured questions to ask when a piece of evidence might be AI-created:

What is the source of this media?
Who had custody?
Are there detectable signs of manipulation?

There's also a push for developing technology-driven authentication solutions. Researchers and companies are racing to create deepfake detection tools — AI that spots the subtle artifacts of falsified media. But detection lags behind generation. “We aren’t at the place right now where we can count on the reliability of automated tools,” warns Grossman, noting that computer scientists consider this a “tricky problem.” Of course it is: Deepfake creators are going to stay a step ahead of detectors, much like how sophisticated steroid-using athletes are always a step ahead of the drug testers.

Comment: This is a typical article about how the Committee is fiddling while Rome burns. Anyone who has followed the Committee’s work in this area cannot justifiably say that. It’s pretty amusing that people have asked for changes to accommodate AI for “a decade.” Time flies.

5. Article about watermarking.

Kassis and Hengartner *UnMarker: A Universal Attack on Defensive Image Watermarking*:

The abstract summarizes the authors’ findings with regard to the ineffectiveness of watermarks in detecting deepfakes:

Reports regarding the misuse of Generative AI (GenAI) to create deepfakes are frequent. Defensive watermarking enables GenAI providers to hide fingerprints in their images and use them later for deepfake detection. Yet, its potential has not been fully explored. We present UnMarker—the first practical universal attack on defensive watermarking. Unlike existing attacks, UnMarker requires no detector feedback, no unrealistic knowledge of the watermarking scheme or similar models, and no advanced denoising pipelines that may not be available. Instead, being the product of an in-depth analysis of the watermarking paradigm revealing that robust schemes must construct their watermarks in the spectral amplitudes, UnMarker employs two novel adversarial optimizations to disrupt the spectra of watermarked images, erasing the watermarks. Evaluations against SOTA schemes prove UnMarker’s effectiveness. It not only defeats traditional schemes while retaining superior quality compared to existing attacks but also breaks semantic watermarks that alter an image’s structure, reducing the best detection rate to 43% and rendering them useless. To our knowledge, UnMarker is the first practical attack on semantic watermarks, which have been deemed the future of defensive watermarking. Our

findings show that defensive watermarking is not a viable defense against deepfakes, and we urge the community to explore alternatives.

Comment: It appears that the authors have prepared AI that will destroy the possibility of using watermarks to guard against deepfakes. Why would you do that?

At any rate, the article indicates that watermarks are not a failsafe for protecting against successful deepfakes.

6. Article about efforts in the state of Georgia regarding deepfakes.

Emily Johnson, *Ga.'s Chief Justice Warns of AI's Risks to Trial Evidence*, Law360, August 28, 2025:

As generative artificial intelligence tools have become widely accessible, Georgia's chief justice said Thursday he's worried about how the technology can be used to manipulate and distort evidence presented in court and what the judiciary can do to prevent that. Speaking before the state's Judicial Council, which he chairs, Georgia Supreme Court Chief Justice Nels S.D. Peterson said that AI tools have complicated the court's ability to know if evidence is authentic, and he wondered how state judges can be sure if a recording or other evidence submitted to the court has not been altered with AI tools.

"There really are some critical challenges that we are going to have to grapple with in this space – authentication of evidence," Justice Peterson said at the session." Just the words that have already been spoken by everyone in this meeting, if you have the recording of this meeting that is available online, you can make audio clips of any of us saying whatever you want," he continued. "Which really does raise some serious questions about what do we do when you're trying to introduce a recording as evidence in a judicial proceeding."

The discussion arose as Justice Andrew A. Pinson presented to the council about the Artificial Intelligence and the Courts Committee's report submitted in June. * * * Justice Pinson said the "foremost recommendation is that we need to keep looking at this issue [and] have an ongoing committee in some form, because it's really early days with respect to this technology and other similar emerging technologies." Justice Pinson said the judiciary also needs "some technical expertise and support to help us, whether we need to give top-down guidance going forward [or] whether we need to be on the lookout for particular risks as they arise."

While he said there's more work to do, Justice Pinson said the committee "has made some initial recommendations in terms of education and ideas for the risk side of AI, including what to do about hallucinations, its impact on trial evidence."

“Most of that has to do at this point with education and perhaps some ideas on how we can better authenticate those evidentiary pieces when they come to trial courts,” Justice Pinson said. “The overarching view is, for now, we want to be very careful in terms of privacy and confidentiality, because many of these tools are not careful with respect to those things, so we want to temper our expectations for now with that.”

* * * The 48-page report submitted in June recommended that the state begin pilot programs tailored to specific use cases of artificial intelligence across each class of court or jurisdiction. The committee report said that “AI-generated evidence, including deepfakes and algorithmically enhanced audio, visual, and textual content, introduce significant challenges to traditional evidentiary standards,” which underscores “the need for clear guidelines and robust authentication procedures.”

“Recommendations include developing comprehensive judicial training programs to ensure accurate evaluation of AI-generated evidence, creating standardized procedures for evidence authentication, and maintaining transparency regarding AI involvement in evidence preparation,” the committee said. “Courts are encouraged to use clear labeling and disclosure practices to help judicial officers, attorneys, and jurors understand the context and origin of AI-generated materials.”

The committee said third-party review of evidence can help when the authenticity of evidence is challenged as modified or even wholly created by AI.

“Courts could potentially partner with neutral third parties such as educational institutions with relevant resources to help with this kind of evidentiary review,” the committee said. “Where possible, collaboration with external stakeholders to standardize review of challenged evidence is encouraged.”

Justice Peterson said the judicial council’s AI committee reached a similar conclusion as the bar’s AI committee — that this issue needs continued examination. “The short version of these committees is that we don’t really have answers to those yet, but we’re hopeful that at some point we will,” Justice Peterson said.

* * *

Comment: Georgia seems to be taking the same wait and see approach to deepfakes as this Committee is taking.

C. Case

United States v. Schram, 128 F.4th 922 (8th Cir. 2025): The defendant was convicted of child pornography offenses. The parties agreed that the defendant could not be convicted if the pictures were not real children but rather computer-generated facsimiles. The jury found that the pictures were not computer-generated, and the defendant argued that the evidence on that point was insufficient because the government presented no technological evidence; it simply proffered the photographs. The court found that the jury could “inspect those excerpts and decided for itself that the children were real.” It cited its own case law and cases from the Fifth and Tenth Circuits for that proposition. The court stated that “[w]ith improvements in image-generation technology, we may someday have to revisit our precedent, but Schram has not convinced us that today is that day.” The court was underwhelmed by the defendant’s showing that such pictures can now be easily faked by anyone. It found nothing in the submission indicating that jurors are unable to distinguish realistic images of virtual children from images of real children. The court concluded that “the government need not produce evidence to negate a speculative assertion that a child in an image is virtual.” The court cited a study from Stanford concluding that today, “less than one percent of child sexual abuse material was both computer generated and photorealistic.”

Comment: This case is not about admissibility of deepfakes, but it is pertinent to the enquiry. The proposals for amending the Evidence Rules are based on the fundamental proposition that jurors are not able at this time to distinguish real from fake. And yet that notion is rejected under the above case law, the consequences of which are far greater than admissibility of evidence under the Federal Rules. In *Schram*, the *foundation of the guilty verdict* is the presumption that jurors *are* able to detect deepfakes.

Moreover, the court’s assertion that “the government need not produce evidence to negate a speculative assertion that a child in an image is virtual” is analogous to the position taken by the draft Rule 901(c). It is not enough to yell “deepfake.” The opponent must make some sort of showing before a deepfake analysis is justified.

II. The Evidentiary Problem Raised by Deepfakes

A deepfake is an inauthentic audiovisual presentation prepared by software programs using artificial intelligence. California, by statute, defines deepfakes as “audio or visual content that has been generated or manipulated by artificial intelligence which would falsely appear to be authentic or truthful.” CAL. GOV’T CODE § 11547.5(a)(1) (West 2023).

Of course, photos and videos have always been subject to forgery, but developments in AI make deepfakes much more difficult to detect. Software for creating deepfakes is freely available online and fairly easy for anyone to use. As the software’s useability and the item’s apparent genuineness keep improving over time, it will likely become harder for lay jurors, and even judges, to tell real from fake.

Currently most deepfakes involve machine learning algorithms that are simultaneously pitted against one another. One of these programs is a generative model that creates candidate data samples; the other is a discriminator model, which evaluates the candidates for accuracy.

The discriminator model estimates the probability that the candidate came from the generative model (a machine creation) or sample data (a real-world original). These two models operate in a cyclical fashion and learn from each other. The generative model constantly improves its ability to create candidates that have a lower probability of failing the detection algorithm as the discriminator model learns to keep up, a process that continuously improves the apparent genuineness of the creation. So when a new method is developed to detect fakes, deepfake creators can use that to their advantage in their discriminator models.

The problem created by deepfakes offered at trial is one of *authenticity*. If a deepfake item is presented as an accurate reflection of an event, it is not what the proponent says it is, because it is fake. Proposals to amend the authenticity rules to handle the risk of deepfakes have been considered by the Committee in previous meetings. The Committee has tentatively approved a new Rule 901(c) to treat deepfake issues. That proposed rule has so far been held in abeyance, however, as the Committee has not yet found the deluge of deepfakes on the courts that many commentators have predicted.

III. A Possible Rule 901(c)

A. The Draft Amendment

The draft of Rule 901(c), and a draft of the Committee Note, is as follows:

Rule 901. Authenticating or Identifying Evidence

(c) Potentially Fabricated Evidence Created by Artificial Intelligence.

(1) Showing Required Before an Inquiry into Fabrication. A party challenging the authenticity of an item of evidence on the ground that it has been fabricated, in whole or in part, by generative artificial intelligence must present evidence sufficient to support a finding of such fabrication to warrant an inquiry by the court.

(2) Showing Required by the Proponent. If the opponent meets the requirement of (1), the item of evidence will be admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

(3) Applicability. This rule applies to items offered under either Rule 901 or 902.

Committee Note

This new subdivision is intended to set forth guidance and standards when a party-opponent alleges that a proffered item of evidence is a “deepfake” --- i.e., that it has been prepared by the use of generative artificial intelligence so that it is not an authentic item --- not what the proponent says it is.

18 The term “artificial intelligence” can have several meanings. It is not a static term. In this
19 rule, “artificial intelligence” means software used to perform tasks or produce output previously
20 thought to require human intelligence. “Generative artificial intelligence” is used in this rule to
21 cover technology that can produce various types of content, including text, imagery, audio and
22 synthetic data. Generative artificial intelligence creates new content in response to a wide variety
23 of user inputs.

24 The rule sets out a two-step process for regulating claims of deepfakes. First, the opponent
25 must set forth enough information for a reasonable person to find that the item has been fabricated
26 in whole or part by the use of generative artificial intelligence. Thus, a broad claim of “deepfake”
27 is not enough to put the court and the proponent to the time and expense of showing that the item
28 has not been manipulated by generative artificial intelligence. Second, if the opponent has shown
29 enough to merit the inquiry, the proponent must then show to the court that the item is more likely
30 than not authentic. While that Rule 104(a) standard is higher than what is ordinarily required for a
31 showing of authenticity, it is justified because any member of the public now has the capacity to
32 make a deepfake, with little effort and expense, and deepfakes have become more difficult to detect
33 by jurors. It is therefore reasonable for the court to require a showing, by a preponderance of the
34 evidence, that the item is not a deepfake, once the opponent has met its burden of going forward.

35 If the opponent satisfies its burden of going forward, the proponent will not establish
36 authenticity simply by satisfying one of the illustrations of authenticity set forth in Rule 901(b).
37 Rule 901(b) sets forth illustrations that “establish” the authenticity requirement --- but that is in
38 the context of the lower standard of proof set forth in Rule 901(a). So for example, testimony of a
39 witness with knowledge (Rule 901(b)(1)) will establish evidence sufficient to support a finding
40 that the item is authentic under Rule 901(a). But that knowledge will not necessarily, or even likely,
41 prove more likely than not that the item is authentic, especially given the opponent’s submission
42 showing some likelihood of a deepfake. Requiring a stronger showing of authenticity is justified
43 for the very reason that a person with “knowledge” may well think that the item is genuine when
44 in fact it is a deepfake.²

45 This amendment covers specific proffered items as to which the opponent has presented a
46 sufficient foundation of fabrication. It does not directly address another possible consequence ---
47 that because of the background risk of deepfakes, juries might be led to think that no evidence can
48 be trusted. This phenomenon has been called the “liar’s dividend.” But rules are in place to combat
49 claims that “you can’t believe anything you see.” To the extent evidence of such a broad point is
50 proffered, it is subject to exclusion under Rule 403 for being distracting and confusing in the
51 absence of the necessary foundation. *See United States v. Peterson*, 945 F.3d 144, 157 (4th Cir.
52 2019) (finding that a demonstration of how easy it is to fake a text was properly excluded under
53 Rule 403; the proposed demonstration “was an attempt to prejudice the jury—an attempt to
54 confuse it by throwing the veracity of text message screenshots writ large into doubt, without any
55 effort to identify a connection to Peterson’s case.”). And to the extent the point is expressed by
56 lawyers in argument, it is subject to the court’s inherent authority to regulate lawyer argument that
57 is made without foundation in the evidence. *See Lee v. City of Troy*, 339 F.R.D. 346, 367–68
58 (N.D.N.Y. 2021) (reversing the judgment for the defendant after defense counsel argued, without

² This paragraph is new and I would appreciate comment on it. It seems to me that it is necessary to head off the argument from the proponent that “I satisfied Rule 901(b)(1), what more do you want?”

any basis, that the plaintiff’s videos were “manufactured” and stating that “attorneys may not make comments to the jury that are so inflammatory or so unsupported by the record as to affect the integrity of the trial.”).

The requirements of the rule apply to authentication under either Rule 901 or 902. The risk of deepfakes extends to many of the items designated in Rule 902 as self-authenticating --- most obviously newspapers and publications.

Courts are encouraged to exercise their discretion over case management to establish notice requirements in order to limit the possibility that a battle of experts on admissibility of evidence under the rule will occur during a trial. The rule does not set forth notice requirements because the deepfake issue is likely to arise in different contexts, and the appropriate notice may well depend on whether it is a civil or criminal case and on whether the item of evidence is offered for impeachment.

B. Do We Need a Deepfake Amendment?

The proposed Rule 901(c) addresses an important problem: how to regulate an automatic objection “it’s a deepfake” for every offered audio or visual presentation. One question for the Committee is whether those blanket claims present a problem that might be handled by the courts under the existing Rule 901. As discussed in previous memos, a similar concern arose during the rise of texts and social media: the concern that every opponent would argue “my Facebook post was hacked, my text was hacked, and the photo has been photoshopped” and so on. It turned out that courts handled that wave of objections (and continue to do so) by holding that something more than a mere assertion is necessary before an inquiry would be taken into whether such evidence has been faked. Courts have specifically rejected blanket claims like “my account was hacked” -- because such an argument can always be made. Thus, as discussed in previous memos, courts have consistently held that the mere allegation of fabrication does not and cannot be the basis for excluding ESI as unauthenticated as a matter of course, any more than it can be the rationale for excluding paper documents. Courts properly require some showing from the opponent before inquiring into charges of hacking and falsification of digital information. The opponent has a burden of going forward.

The question is whether courts will similarly be able to handle blanket claims of “it’s a deepfake” under the existing rules. There are good arguments on both sides. The argument for no change is that courts handled the previous wave just fine, so there is no need to be concerned about such blanket arguments when it comes to deepfakes. The argument for a new rule is that deepfakes are extremely hard to detect, and while hacking Facebook posts might be a rare occurrence, the potential use of deepfakes could well be broader and wider. *Moreover, a concrete standard for justifying an inquiry --- such as that set forth in the proposal --- could be more useful to the court than the general standards that can be found only in the case law.*

It appears, though, that so far the few courts that have dealt with deepfake claims *have* required a foundation before going forward. And they did that without a rule change. *See, e.g., United States v. Whitehead*, No. 22 CRIM. 692 (LGS), 2024 WL 3085019, at *9 (S.D.N.Y. June

21, 2024) (an unsupported “deepfake” allegation was rejected, with the court finding that an inquiry into AI was not justified on the mere claim of deepfake).

The other and probably more important reason for a new Rule 901(c) is to raise the standard of proof for authenticity when credible deepfake allegations have been made. If deepfakes are going to be flooding the courts, there is an excellent argument that courts are going to be better than jurors at figuring it out --- especially as repeat players --- and so a Rule 104(a) standard will be critical. The new Rule 901(c) does lift the standard of proof to a preponderance as determined by the court, and so it will provide some important protection against widespread admissibility of deepfakes --- protection that does not exist under current law. So the argument that “courts will be able to handle deepfakes in the way they have been able to handle fake digital evidence” misses the fact that courts will probably have trouble excluding deepfakes when applying the current Rule 104(b) standard. They may very well need the higher Rule 104(a) standard to be effective in keeping deepfakes from the jury --- in the same way that they need the 104(a) standard to keep unreliable expert testimony from the jury.

That said, right now it seems that there would be little for Rule 901(c) to do. I found no reported case discussing a proffered deepfake in the time between the Spring meeting and now. That is, no reported case -- under federal or state law -- dealt specifically with authenticating an item that was allegedly deepfaked. All the articles cite the same three examples of deepfakes, and none of those examples actually resulted in improper admission of the deepfake; indeed no deepfake was offered as evidence in these instances.

On the other hand, it must be remembered that rulemaking is slow. If Rule 901(c) were approved for public comment at the Spring meeting, the earliest date of applicability would be December 1, 2028. It seems likely that by that time, deepfakes will have at least reached the courts, and possibly in substantial numbers. Any further delay could be said to risk the possibility of admission of many deepfakes due to the low Rule 104(b) standard of proof that remains applicable until changed by Rule 901(c). One can argue that courts can handle claims of fakery under existing rules, but that might not actually be true when fakes are so easy to make and undetectable, *and the existing rule is so permissive*, leaving almost all authenticity questions to the jury.

The slowness of the rulemaking process might ironically be a factor that would justify approval of Rule 901(c) at the Spring, 2026 meeting.³ The Committee could propose a rule for public comment at that meeting, and it would be another whole year before the Committee would revisit the rule. If there was no significant deepfake activity in the courts by the end of the comment period, that would be a reason to pause – the rule could be taken back after public comment. On the other hand, if courts were having trouble with deepfakes during that year, that could be a reason to keep going. And the public comment on an AI proposal is sure to be massive and hopefully helpful. So there is much to be said for agreeing upon language and putting out a proposal at the Spring meeting.

At any rate, at the last meeting, the consensus was against proceeding on a Rule 901(c) proposal, and to wait until the attempted admission of deepfakes is more frequent than it currently

³ Approving the rule at this Fall, 2025 meeting makes no sense as it cannot be issued for public comment until next August. So, best to wait for the Spring meeting.

is. At this meeting, input from the Committee will be sought about its current views on whether it is appropriate to take action. And if the answer to that remains “not yet”, the Committee is nonetheless invited to look at the draft amendment and Committee Note and provide any suggestions for improvement. That way, when the Committee does determine that there is a need to go forward, much of the hard work will already have been done. The plan is to submit the proposal at every meeting for the next few years.

C. What to Do About the Liar’s Dividend?

It has often been argued that a byproduct of the age of deepfakes will be the Liar’s Dividend: that a party will be able to argue persuasively that even authentic items are fake because it is so easy to create fake documents, videos and audios, and so “you can’t believe what you see.” The question is what, if anything, the Committee can or should do to address the possibility that a party will rely on a Liar’s Dividend at trial.

A liar’s dividend argument can be presented in two ways. First, a lawyer might simply argue to the jury, without any specific basis or justification, that a video or audio is fake --- because fakes are so prevalent, and you never know. Second, a lawyer might seek to present demonstrative evidence of how easy it is, in general, to fake videos, audios, etc. [Note that if a party is proffering *evidence* that the *particular* proffered item at issue is fake, that is not a liar’s dividend problem. That is a problem of authenticity which is discussed elsewhere in this memo.]

As to argument by lawyers, without basis, that the item could be fake: Argument by lawyers is of course not evidence, and so one would not look immediately to the Federal Rules of Evidence for regulation. It turns out, though, even without a Federal Rule, there is plenty of precedent holding that trial courts have inherent authority to regulate, prohibit, and sanction lawyer argument that is without basis in the evidence. For example, in *Lee v. City of Troy*, 339 F.R.D. 346, 367–68 (N.D.N.Y. 2021), the parties presented two versions of an important video. The defense counsel argued to the jury, without basis, that the plaintiff’s version was “manufactured” and the defendant’s version was “official.” The court reversed the judgment for the defendant, finding that it was error to make an argument that was not supported by any evidence. It stated that “in the Second Circuit, attorneys may not make comments to the jury that are so inflammatory or so unsupported by the record as to affect the integrity of the trial.” The court found that “there is no discernible support in the record for defendants’ counsel’s repeated assertion that P-12 was manufactured” so the “nine statements to that effect were improper.”

So it is not at all clear that a rule amendment is necessary to regulate lawyer’s baseless argument that evidence is fake. See also *Aidini v. Costco Wholesale Corp.*, No. 215CV00505APGGWF, 2017 WL 10775082, at *1 (D. Nev. Apr. 12, 2017) (prohibiting counsel argument: “Of course, counsel must have an evidentiary or legal basis for any statements to the jury.”).

Another possible limitation on an unsupported argument of “deepfake” might be the rules of professional responsibility. Model Rule of Professional Conduct Rule 3.1 requires that attorneys must assert only those claims with a basis in law and fact so “that is not frivolous.” Model Rule 3.3(a) states that a lawyer may not knowingly make a false statement of fact or law to a tribunal.

These provisions may not work to keep all deepfakes out of the court, because a lawyer seeking to admit an item may not know that the client has made a deepfake. But the liar's dividend problem is by definition one in which the lawyer is arguing deepfake but without any support for that argument. So the ethics provisions seem right on point.

It would appear, then, that there is enough in the law already to combat, and deter, lawyers from making baseless deepfake arguments at trial. That said, it certainly wouldn't hurt to emphasize the court's authority to regulate lawyer argument when it comes to deepfakes. The Committee Note to the draft Rule 901(c), set forth above, does in fact call attention to the court's authority to prohibit a liar's dividend argument.

As to demonstrations of how easy it is to make a deepfake: That would be demonstrative evidence and it would be controlled by Rule 403. There is already case law under Rule 403 that could be relied on to prohibit a demonstration of deep fakery when there is no factual basis to believe that there is anything fake in the instant case. It turns out that case law prohibits offering such evidence in the absence of any foundation that a deep fake is possible under the circumstances.

The leading case is probably *United States v. Peterson*, 945 F.3d 144, 157 (4th Cir. 2019), a drug prosecution, in which the defendant had made and received a number of incriminating texts. These were all properly authenticated; there was no basis to suspect that they were fake. But at trial, defense counsel sought to put on evidence that texts in general could be easily faked, by demonstrating how a text could be manufactured using software available for free on the internet. [This would be the equivalent of a demonstration of how easy it is to make a deepfake audio or video, in the absence of any evidence that it occurred in the instant case.] The trial court prohibited the demonstration, citing Rule 403. It stated that in the absence of a foundation ---meaning that there was no cause to believe that fakery had occurred in this case --- the demonstration had little probative value and raised a risk of confusion, distraction, and unfair prejudice. The Court of Appeals affirmed, declaring that the trial court properly applied Rule 403. The attempted demonstration "had virtually no probative value" because counsel "offered no evidence to suggest that the screenshots submitted at trial were fabricated." The court declared that "Peterson's proposed demonstration was an attempt to prejudice the jury—an attempt to confuse it by throwing the veracity of text message screenshots writ large into doubt, without any effort to identify a connection to Peterson's case."

A similar line of cases covers attempts to introduce evidence of an alternative perpetrator. Courts have applied Rule 403 to prohibit proof that "somebody else must have done it" unless the proponent establishes a foundation that there is a real connection between the alleged alternative perpetrator and the crime. Anything less would just distract and confuse the jury. See, e.g., *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998) (trial court properly prohibited evidence that another group may have done the crime, because the defendant did not establish a sufficient foundation that the other group actually committed the crime).

In sum, it would appear there is sufficient case law under Rule 403 to prohibit general demonstrations of fakery when there is no indication of fakery in the case. But again, it would not

hurt to advertise that source of authority in a Committee Note --- as the passage in the above Committee Note demonstrates.

Would it make sense to draft a rule that would address the liar's dividend? Probably not. First, it seems appropriate to wait to see if such arguments and evidentiary proffers are being frequently used --- they are not today. Second, if the problem does arise with some frequency, it probably makes sense to see if the courts are able to handle it with the tools discussed above. Third, a rule specifically dealing with the liar's dividend might be thought to be too narrow. Why single out the liar's dividend argument when parties might seek to make other unjustified foundation-free arguments or present other evidentiary distractions without a sufficient foundation?

That said, as discussed above, it is probably useful to add a paragraph discussing the liar's dividend to the Rule 901(c) Committee Note should the Committee decide to propose adoption of a new Rule 901(c). A Committee Note has the virtue of avoiding a new, probably too-narrow rule that is in part about argument and part about evidence. And it might be a helpful addition to instruct courts and lawyers on where to find the authority for controlling evidence and argument that is intended to reap the liar's dividend.

As set forth above, the draft amendment adding a new Rule 901(c) contains proposed note language directed to the liar's dividend.

D. Is a Change to Rule 901(b) Warranted?

An article submitted in the last agenda book advocates an amendment to Rule 901(b) to regulate the threat of deepfakes. Basically, Rule 901(b) allows authentication by a person who is familiar with the item. See Rule 901(b)(1)(testimony of a witness with knowledge); Rule 901(b)(5) (opinion about a voice based upon familiarity). The proposed amendment to Rule 901(b) would be independent from, and in addition to, adoption of a new Rule 901(c). See Rebecca Wexler, Hany Farid, et. al., <https://www.lawfaremedia.org/article/ai-generated-voice-evidence-poses-dangers-in-court>. The Committee reviewed the article at the last meeting, but as the proposal was not affirmatively rejected, I am raising it again for this meeting.

The basic argument is that an ordinary person familiar with the item might authenticate it and yet have no way of knowing whether it is a deepfake. A person could look at a video and say, "yes, that is the defendant, I'd know him anywhere" and yet be fooled by the fact that while it looks like the defendant, it's a bunch of pixels masquerading as the defendant. And yet, according to the authors, the court has no authority to exclude such a video --- the deepfake question must be left to the jury. The authors conclude that:

The Evidence Rulemaking Committee should fix this problem by adding the word "may" to Rule 901(b) so that it reads: "The following are examples only—not a complete list—of evidence that *may satisfy* ~~satisfies~~ the requirement [of authenticity]"). This would affect admissibility for all the enumerated examples, including the option to authenticate the identity of a person's voice by calling a witness to the stand who says they recognize the speaker. [A finding of authenticity would be discretionary rather than mandatory.]

What recent perceptual studies of AI-powered voice clones do show is that a mandatory route to authentication can quickly become outdated. Hence, it would be better for authenticating all kinds of evidence to give judges discretion to decide on a case-by-case basis whether the party offering the evidence has made a sufficient showing that it is what they claim it is. Judges would still apply the low sufficiency standard, so they would not be substituting their judgment for that of the jury, raising the burden on parties seeking to introduce evidence, or opening the floodgates to a morass of evidentiary disputes. But the rules would no longer force judges to admit evidence when there is compelling proof that the evidence is fake.

Reporter’s Comment: Assuming the Committee finds it necessary to deal with the risks of deepfakes, the better solution is to have a new Rule 901(c), as discussed in this memo. The article seems to require a special showing from the proponent for every single digital item admitted at trial. Surely the better procedure is to require the opponent to establish a foundation before something special is required of the proponent. Under the Committee’s draft, assuming that the opponent provides a foundation of fakery, the evidence would not be admitted simply because the proponent has a witness who identifies the item. The proponent in this situation would have the burden of showing authenticity by a *preponderance of the evidence*. While Rule 901(b) says that self-identification is enough to establish authenticity under the lower Rule 104(b) standard, it doesn’t say that it is enough under the higher standard.⁴ Thus, the Committee draft is flexible enough to allow courts to give as much or little credit to the identification witnesses as is justified under the circumstances.

In contrast, the authors’ proposal is essentially standard-free. The judge has discretion to find authenticity, or not, when one of the Rule 901(b) illustrations is met. That would be true for every single instance of authentication. The judge can essentially usurp the jury’s role (even with the lower standard of proof) under the guise of exercising discretion. If all authenticity grounds became “may” and not “must,” the power to review items for authentication is shifted to the court and away from the jury. That switch is probably justified for deepfakes, but it is not justified for the vast majority of items that are authenticated for trial. So it makes no sense to propose a change from “must” to “may” for anything other than deepfakes; and deepfakes are probably better regulated under Rule 901(c) than they would be under the authors’ proposal.

⁴ Note that there is a paragraph in the draft Committee Note that makes this point: satisfying the Rule 901(b) illustrations does not automatically establish authenticity once the opponent has shown enough to plausibly indicate that the item is a deepfake.

TAB IV

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposed Amendments to Rule 609, out for public comment
Date: October 1, 2025

At its last meeting, the Committee approved for public comment proposed amendments to Rule 609, the rule governing impeachment of witnesses with prior convictions. The proposed amendments were unanimously approved by the Standing Committee (with some minor changes to the Committee Note).

The proposed amendments make two changes: 1. The balancing test for convictions under Rule 609(a)(1)(B), for convictions not involving dishonesty or false statement offered against a criminal defendant, is made somewhat more exclusionary; and 2. The time period for measuring old convictions under Rule 609(b) is clarified to extend from the date of release from confinement to the date of trial.

This memorandum analyzes the public comment that has been received on the amendment to date. No votes on the rule are being taken at this meeting. The public comment period ends on February 15, 2026. Nonetheless, the comments received to date can be reviewed, and tentative decisions can be made on whether any of them justify a change to the proposal.

As of this writing, one public comment has been received on Rule 609. It is discussed below.

I. The Proposed Amendments and Committee Note

The proposed amendments and Committee Note provide as follows:

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

6 (A) must be admitted, subject to Rule 403, in a civil case or in a criminal
7 case in which the witness is not a defendant; and

8 (B) must be admitted in a criminal case in which the witness is a
9 defendant, if the probative value of the evidence substantially
10 outweighs its prejudicial effect to that defendant; and

11 (2) for any crime regardless of the punishment, the evidence must be admitted
12 if the court can readily determine that establishing the elements of the crime
13 required proving—or the witness’s admitting—a dishonest act or false
14 statement.

15 (b) **Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if
16 more than 10 years have passed ~~since~~ between the witness’s conviction or release
17 from confinement for it, (whichever is later) and the date that the trial begins.
18 Evidence of the conviction is admissible only if:

19 (1) the probative value, supported by specific facts and circumstances,
20 substantially outweighs its prejudicial effect; and

21 (2) the proponent gives an adverse party reasonable written notice of the intent
22 to use it so that the party has a fair opportunity to contest its use.
23

24 * * * * *

25 Committee Note

26 Rule 609(a)(1)(B) has been amended to provide that a non-falsity-based conviction should
27 not be admissible to impeach a criminal defendant unless its probative value *substantially*
28 outweighs the risk of unfair prejudice to the defendant. Congress allowed such impeachment with
29 non-falsity-based convictions under Rule 609(a)(1), but imposed a reverse balancing test when the
30 witness was the accused. That test is more protective so as not to infringe on the accused’s
31 constitutional right to testify. The amendment underscores the importance of applying a protective
32 balance. The amendment also makes the balancing test consistent with that in Rule 703. Courts
33 are familiar with the formulation “substantially outweighs” as the same phrase is used throughout
34 the rules of evidence to describe various balancing tests. Cf. Rule 403.

35 If a conviction is inadmissible under this rule, it is inappropriate to allow a party, under
36 Rule 608(b), to inquire into the specific instances of conduct underlying that conviction. Rule 608
37 permits impeachment only by specific acts that have not resulted in a criminal conviction.
38 Evidence relating to impeachment by way of criminal conviction is treated exclusively under Rule
39 609.

40 Nothing in this rule prohibits the use of convictions to impeach by way of contradiction.
41 Such impeachment is governed by Rule 403. So for example, if the witness affirmatively testifies
42 that he has never had anything to do with illegal drugs, a prior drug conviction may be admissible
43 for purposes of contradiction even if not admissible under Rule 609. *See* United States v. Castillo,
44 181 F.3d 1129 (9th Cir. 1999) (unequivocal denial of involvement with drugs on direct examination
45 warranted admission of the witness’s drug activity under Rule 403).

46 A number of courts have, in a kind of compromise, admitted only the fact of a conviction
47 to impeach a defendant in a criminal case. Thus the jury hears only that the defendant was
48 convicted of a felony, not what the crime was. Absent agreement by the parties, that solution is
49 problematic because convictions falling within Rule 609(a)(1) have varying probative value, and
50 admitting only the fact of conviction deprives the jury of the opportunity to properly weigh the
51 conviction’s effect on the witness’s character for truthfulness.

52 In addition, Rule 609(b) has been amended to set an endpoint by which the rule’s 10-year
53 period is to be measured. The lack of such an endpoint in the existing rule has led courts to apply
54 various endpoints, including the date of the charged offense, the date of indictment, the date of
55 trial, and the date the witness testifies. The rule provides for the date that trial begins as the
56 endpoint, as that is a clear and objective date and it is the time at which the factfinder begins to
57 analyze the truthfulness of witnesses.

II. Analysis of Public Comment

- Rule 609(b) --- End date of ten-year period

Bobby Levine, Esq. (USC-RULES-EV-2025-0034-0003) States that “[w]hile any clarification on how to properly measure a conviction’s age would be an improvement, the most appropriate endpoint is not the start of trial—it is the date of indictment in a criminal case or complaint in a civil case.” He argues that setting the endpoint at the date of trial would give rise to gamesmanship, i.e., parties would seek delay of a trial date to protect a witness against impeachment with convictions that are close to ten years old (or, to the contrary, would seek to accelerate a trial date to permit such impeachment). He argues that the date of indictment or complaint is less subject to manipulation because at that point nobody could be thinking about the possibilities of impeaching a witness with an old conviction.

Comment: The Committee considered, and rejected, the date of indictment or complaint as a proper endpoint. The Reporter’s memorandum for the last meeting addressed the date of indictment as an end point precisely because Mr. Levine had advocated for that position in a law review note. The memo recognized that the date of indictment is less subject to manipulation of the 10-year period than is the date of trial. But the risk of strategic activity cannot be the sole basis for setting an endpoint, especially because the opportunity to strategize arises so infrequently. The fact situation for strategic thinking is decidedly narrow. It has to be a conviction that is just approaching whatever 10-year deadline is set, and the witness has to be very important to the case.

Setting the endpoint at indictment or complaint is off-point when you consider the reason that impeachment is allowed --- to assess the witness's character for truthfulness *at the time she testifies*. Moreover, there may well be cases where there are many years between the indictment (or complaint) and the testimony --- or there may be many years between indictment/complaint and a retrial in which the testimony is provided. The date of indictment is about as random and arbitrary as the date of the offense.

It is also worth noting that most courts have held that the date the trial begins is the appropriate endpoint for a Rule 609(b) calculation.¹ This solution is appealing, in part, because the date is easy to ascertain and the trial is the point in time when the factfinder at least begins to assess credibility of witnesses. Thus, using the date of trial as the endpoint in text is the option that is least disruptive to existing case law.

Accordingly, there seems to be no reason to adopt the position of the public comment; the date of trial should be retained as the endpoint for timing of the conviction under Rule 609(b).

¹ *United States v. Thompson*, 806 F.2d 1332, 1339 (7th Cir. 1986) (using the date “[t]he trial in the present case began” as the endpoint); *United States v. Hans*, 738 F.2d 88, 93 (3d Cir. 1984) (“Normally such evidence is admissible only if either the conviction or the witness’ release from prison occurred within 10 years of the trial.”); *United States v. Portillo*, 633 F.2d 1313, 1323 n.6 (9th Cir. 1980) (noting the age of the defendant’s prior felony convictions “[a]t the time of trial”); *United States v. Cobb*, 588 F.2d 607, 612 n.5 (8th Cir. 1978) (“Cobb’s 1966 conviction appears to fall within the ten-year limitation, because his period of confinement apparently ended less than ten years prior to the date of his trial here in June 1978.”); *United States v. Mahler*, 579 F.2d 730, 734 (2d Cir. 1978) (using the age of the conviction “at the time of the second trial”).

TAB V

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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Rule 902(1): Self-Authentication of the Records of Federally Recognized Indian Tribes and Nations
Date: September 19, 2025

At its Spring 2025 meeting, the Evidence Advisory Committee considered a potential amendment to Federal Rule of Evidence 902(1) to make the sealed and signed records of federally recognized Indian tribes self-authenticating.¹ After a robust discussion of the possible amendment, the Committee resolved to solicit feedback from federally recognized tribal nations and governments before considering the amendment further. The Administrative Office of the United States Courts circulated a letter from Judge Furman seeking input regarding a potential amendment to Rule 902(1) to twenty-three tribal organizations and representative entities on May 23, 2025. The A.O. expanded circulation of Judge Furman's letter to all 585 tribal leaders for whom it has contact information on September 15, 2025, to ensure maximum participation. To date, the Committee has received four submissions offering feedback regarding the potential amendment to Rule 902(1).

This memorandum describes the proposal to amend Rule 902(1), as well as the tribal feedback that has been obtained thus far in three parts. Part I describes the recommendation from the Department of Justice to amend Rule 902(1) at the May 2025 Advisory Committee meeting, as well as opposition to the proposed amendment from the Federal Public Defender. Part II reviews the Committee's discussion of the proposal at the May 2025 meeting and the Committee's determination to seek feedback from tribal governments and organizations before proceeding further. Finally, Part III describes the process followed by the Administrative Office of the United States Courts to solicit such feedback and summarizes the feedback obtained by the Committee to date.

¹ The Committee originally received a recommendation to consider an amendment that would add "federally recognized tribes" to the list of enumerated government entities on the eve of the Fall 2024 meeting from a federal judge. A similar proposal was on the Committee's agenda over a decade ago, but no action was taken on the matter at that time. The Committee deferred consideration of the proposal in Fall 2024 pending input from the Department of Justice.

An amendment to Rule 902(1) is not an action item at this meeting. The Committee may consider whether to proceed with a proposal to amend Rule 902(1) at the Spring 2026 meeting after considering all tribal input received at that time.

I. Department of Justice Proposal to Amend Federal Rule of Evidence 902(1)

Federal Rule of Evidence 902(1) provides for the self-authentication of sealed and signed domestic public documents, as follows:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

- (1) Domestic Public Documents That Are Sealed and Signed. A document that bears:
 - (A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and
 - (B) a signature purporting to be an execution or attestation.

At the May 2025 meeting of the Evidence Advisory Committee, the Department of Justice (“DOJ”) proposed an amendment to FRE 902(1) to “add federally-recognized Indian tribes” to the list of governmental entities that can provide sealed and signed documents that are self-authenticating.² The DOJ argued that there is no logical reason to exclude the documents of federally recognized tribes from those that are self-authenticating. The DOJ pointed out that federal criminal jurisdiction under the General Crimes Act, 18 U.S.C. § 1152, and under the Major Crimes Act, 18 U.S.C. § 1153, depends upon the Indian status of victims and defendants, and emphasized the need to utilize tribal government documents to establish this element essential to jurisdiction. The DOJ noted that Rule 902(1) currently includes an expansive list of governmental entities whose records are self-authenticating and that there is no logical reason to exclude federally recognized tribal governments (with whom the United States maintains a “government-to-government relationship”) from that comprehensive list.³ The DOJ further argued that potential variation among tribal record-keeping practices should not disqualify those records from self-authentication given the wide variation in record-keeping practices among currently listed municipal and territorial entities and the lack of any review of the record-keeping practices of currently recognized governmental entities. The DOJ further argued that there is reason to trust the reliability of the records of federally recognized tribal governments given the

² See Memorandum to Judge Furman from the U.S. Dep’t of Justice (March 28, 2025) (recommending the amendment to Rule 902(1)), available at [2025-05_evidence_rules_committee_agenda_book_final.pdf](#).

³ See Federally Recognized Indian Tribe List Act of 1994, P.L. 103-454 (Nov. 2, 1994).

important purposes those records serve.⁴ The DOJ argued that the burden and cost of authenticating tribal records essential to federal criminal jurisdiction (on prosecutors, defendants, tribal governments, and federal courts) justify an amendment to Rule 902(1) to add the records of federally recognized tribes and nations to the list of entities whose sealed and signed records are self-authenticating. Finally, the DOJ argued that respect for tribal sovereignty and dignity supports the addition of federally recognized tribes to the list of approved governmental entities in Rule 902(1).

The DOJ proposed amending Rule 902(1), as follows:

(1) Domestic Public Documents That Are Sealed and Signed.

A document that bears:

- (A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; a federally-recognized Indian tribe; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

The DOJ also proposed an Advisory Committee note, as follows:

The rule has been amended to recognize the sovereignty of Indian tribes and provide that a sealed document from a federally-recognized Indian tribe is entitled to the same presumption of authenticity as a comparable document from the government entities currently listed in Rule 902. *See* Fed. R. Crim. P. 6(e)(3)(A)(ii) and (iii), and 2002 Committee Note (amendments recognize “the sovereignty of Indian tribes and the possibility that it would be necessary to disclose grand-jury information to appropriate tribal officials in order to enforce federal law.”). Under the Federally Recognized Indian Tribe List Act of 1994 (P.L. 103-454), the Secretary of the Interior publishes a list of all federally recognized Indian tribes in the Federal Register.

The Federal Public Defender for the District of Nevada (“FPD”) also submitted a memorandum to the Committee in May 2025, urging the Committee to reject the amendment to Rule 902(1) proposed by the DOJ.⁵ First and foremost, the FPD argued that an amendment to Rule 902(1) is unnecessary because the Federal Rules of Evidence provide multiple mechanisms for proving Indian status that the government has used successfully for decades. The FPD pointed out that issues of authentication have arisen only in a few cases in a district relatively

⁴ *See* Memorandum to Judge Furman from the U.S. Dep’t of Justice, at 4 (March 28, 2025) (“Tribes set criteria for enrollment and maintain related records, which are critical to their government-to-government relationships with the United States and for determining the benefits to which tribes and their members may be entitled.”), available at [2025-05_evidence_rules_committee_agenda_book_final.pdf](#) (Tab 6A).

⁵ *See* Memorandum to Judge Furman from the Federal Public Defender, District of Nevada (April 3, 2025), available at [2025-05_evidence_rules_committee_agenda_book_final.pdf](#) (Tab 6B).

new to federal prosecutions of Indian defendants. Furthermore, the FPD argued that the proposal failed to take the diversity of Indian tribes and tribal record-keeping into account: “Without a more nuanced understanding of the universe of tribes and tribal documents potentially affected by the amendment, the amendment risks introducing uncertainty into a system that is, at the present time, easily understood by all parties.” Finally, the FPD argued that action should not be taken in the name of tribal dignity and sovereignty without consultation with Indian tribes and nations whose records are at issue and whose citizens may be affected by the change.

II. Advisory Committee Consideration of Proposal to Amend Rule 902(1)

The Advisory Committee discussed the possible amendment of Rule 902(1) at length at its May 2025 meeting. Friendly amendments to the DOJ proposal were offered to add “or nation” to the description of self-authenticating tribal records and to remove the hyphen from “federally-recognized.”

Committee members questioned the need for the amendment given existing avenues for authenticating tribal records under the Federal Rules of Evidence. The DOJ argued that the burden involved in proving largely undisputed tribal affiliation justified an amendment streamlining the process of proof. Other Committee members noted that there is great variability in record-keeping across different tribal governments but that the same variation also exists across the municipalities currently recognized under Rule 902(1). The Deputy Director of the Office of Tribal Justice attended the May 2025 meeting and explained that the issue was one of respecting tribal governments and their relationship with the federal government. She argued that there is no valid reason that tribal governments should not be afforded the same respect as municipalities. She further noted that tribal citizenship is a matter that is crucial to the operation of tribal nations and that there is no reason to question the reliability of tribal records on this critical point. Finally, she opined that the burden being placed on tribal governments to provide testimony in support of federal prosecutions is unjustified and substantial. The Federal Public Defender expressed the utmost regard for tribal sovereignty and dignity but argued that bad outcomes in a handful of cases should not justify a rule change and that no harm would be done by pausing any decision on publication of a proposed amendment to Rule 902(1) to allow experts in the field to offer valuable input for the Committee’s consideration.

The Committee noted that the question of affording tribal governments sovereign dignity under Rule 902(1) arises in the unique context of federal criminal jurisdiction and that, while all tribal nations might agree on the general desire for dignity and sovereignty writ large, there could be varying views on tribal recognition for purposes of creating federal criminal jurisdiction over enrolled members. Accordingly, the Committee resolved to solicit feedback from affected tribal nations and representatives before proceeding with an amendment proposal, particularly because tribal dignity and sovereignty represent the principal rationale for the proposal. The Committee resolved to consider the potential amendment of Rule 902(1) in light of that feedback.

III. Feedback from Tribal Nations and Representatives

The Administrative Office of the United States Courts circulated a letter from Judge Furman addressed to Tribal Leaders on May 23, 2025, describing the proposal to amend Rule 902(1). The letter attached the memoranda in support of and in opposition to the proposed amendment

from the DOJ and the FPD and solicited feedback by September 5, 2025. Judge Furman’s letter is attached to this memorandum as Tab 5A. The letter was sent to the following entities on May 23, 2025:

- National Congress of American Indians
- United South and Eastern Tribes
- Midwest Alliance of Sovereign Tribes
- Great Plains Tribal Chairmen’s Association
- Inter-Tribal Association of Arizona
- Inter-Tribal Council of Nevada
- National American Indian Court Judges Association
- Tribal In-House Council Association
- Alaska Federation of Natives
- National Native American Bar Association
- Native American Rights Fund
- Indian Law Resource Center
- Minnesota American Indian Bar Association
- Affiliated Tribes of Northwest Indians
- Federal Bar Association Indian Law Section
- American Indian Law Center
- Navajo Nation Bar Association
- California Indian Law Association
- Native American Bar Association of Arizona
- Northwest Indian Bar Association
- Oklahoma Indian Bar Association
- New Mexico Indian Bar Association
- Native American Bar Association of DC

Judge Furman’s letter requesting feedback was emailed and faxed to 585 federally recognized tribal governments on September 15, 2025 to expand outreach and participation.

The Committee has received four responses to its request for feedback from tribal governments, representatives, and other interested parties thus far. In addition, the Federal Judicial Center submitted a “Rule 902(1)(A) Study” following the Spring 2025 meeting. As summarized below, feedback received from tribal representatives thus far strongly favors an amendment to Rule 902(1) to add federally recognized tribes and Nations to the list of governmental entities whose records are self-authenticating. A submission from the Federal Public Defender community voices continuing concerns and urges the Committee to reject an amendment that would add federally recognized tribes and Nations to Rule 902(1). That submission is attached to this memorandum as Tab 5B

A. Federal Judicial Center Study

Following the Committee’s Spring 2025 meeting, Dr. Timothy Lau of the Federal Judicial Center collected some preliminary statistics on trial disputes regarding the Indian status of either a criminal defendant or of a victim. His findings are attached hereto as Tab 5C. Dr. Lau found that, of the 1,516 criminal defendants whose cases were resolved by jury trial in 2023, the Indian

status of the defendant or victim was a jurisdictional predicate for approximately 80 – roughly 5% of all defendants. Of these 80 defendants, the Indian status of the defendant was at issue for 67 and the status of the victim was at issue for 13. Fifty-two of the 67 defendants whose Indian status was a jurisdictional predicate stipulated to their Indian status and three did not contest their status. Nine of the 13 defendants for whom the Indian status of the victim was at issue stipulated to that status. For the 269 criminal cases disposed of by bench trial in 2023, there was only one in which the defendant’s Indian status was a jurisdictional predicate and Dr. Lau could find no information as to whether the issue of status was contested. Dr. Lau has offered to do further work in collecting statistics for 2024 or in interviewing tribal leaders should the Committee deem it helpful.

B. The Chickasaw Nation

The Chickasaw Nation offered feedback on the proposal to amend Rule 902(1) that is attached to this memorandum as Tab 5D. The Chickasaw Nation is “wholly supportive” of the proposal to add federally recognized tribes and nations to Rule 902(1), stating that there is no “logical reason for requiring the sealed and signed documents of federally recognized tribes to be extrinsically authenticated” and that the amendment would “place federally recognized tribes on the same evidentiary footing as states, territories, and insular possessions.” The Chickasaw Nation emphasizes that federally recognized tribes enjoy sovereignty “just as the United States and the states thereof.” Accordingly, “federally recognized tribes should also enjoy the same level of trust to prepare, maintain, and produce accurate records to federal courts that our coordinate sovereigns and their political subdivisions do.”

The Chickasaw Nation also notes the significant burden placed on tribes to authenticate tribal records both in federal courts and in other tribal courts that follow the Federal Rules of Evidence since the uptick in federal and tribal prosecutions following the Supreme Court’s decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020). The Chickasaw Nation reports that its citizenship office receives approximately 50 citizenship verification requests per month from federal prosecutors, and that these requests generate significant burdens in time and expense due to the need for personal testimony from the Executive Officer of Self-Governance to appropriately authenticate citizenship verification documents. Amending Rule 902(1) to provide for self-authentication of tribal records would alleviate this needless burden.

Finally, the Chickasaw Nation responds to the concerns raised by the Federal Public Defenders. First, it argues that differences among federally recognized tribes and their relations with the United States do not undermine the inherent reliability of tribal record-keeping: “The fact that tribal governments have different histories, stories, and interactions with the federal government is not a rational basis for questioning the reliability of federally recognized tribes’ government records wholesale.” The Chickasaw Nation further emphasizes that states and their political subdivisions maintain distinct record-keeping systems and protocols and that sovereign tribal governments do the same. This does not justify excluding tribal government documents from self-authentication. Furthermore, the Chickasaw Nation notes that there are federal standards and federal oversight for essential tribal records that may make tribal records *more reliable* than some state and local records already covered by Rule 902(1). In sum, the Chickasaw Nation strongly supports the proposal to amend Rule 902(1).

C. The Navajo Nation

The Acting Attorney General for the Navajo Nation submitted a letter in support of the amendment to Rule 902(1) that is attached to this memorandum as Tab 5E. The Navajo Nation reports that it is the federally recognized tribe with the “largest land base in the United States” and that “many criminal cases arise on the Navajo Nation that are subject to federal prosecution.” The Navajo Nation contends that, as sovereign governments that regulate their own affairs, federally recognized tribes “should be empowered to provide signed and sealed documents for self-authentication.” The Navajo Nation argues that an amendment to Rule 902(1) would “eliminate[] administrative burden while putting the Navajo Nation on equal footing with other governments” and would be a “welcome change.”

D. The Quapaw Nation of Oklahoma

The Quapaw Nation submitted a letter strongly supporting the proposal to amend Rule 902(1) that is attached to this memorandum as Tab 5F. The Quapaw Nation states that the amendment to Rule 902(1) would “better recognize[], respect[], and uphold[] the principles of tribal sovereignty than the currently enacted Rule 902, which inequitably, concedes as self-authenticating the sealed and signed documents of all government entities except tribal nations.” The Quapaw Nation notes that some of the concerns about the amendment stem from “long-standing misconceptions and implicit biases about the professionalism of tribal nations and the details of their administrative operations.” The Quapaw Nation “applauds” the proposal to amend Rule 902(1) “as an opportunity to correct an obvious wrong with a straightforward fix.” It characterizes the existing Rule as “discriminatory” in treating tribal nations “differently and less than all other sovereigns, even municipalities.” It argues that the possible need for hypothetical, further reforms to other Federal Rules should not stall this important change. Finally, the Quapaw Nation agrees that the decision in *McGirt v. Oklahoma* constitutes “an exceptional and justifiable basis for revisiting” an amendment to Rule 902(1), particularly given the “unprecedented jurisdictional shifts and legal uncertainties” it has created. It notes that “[t]he call to eliminate outdated and complex evidentiary requirements is stronger than ever” and that the amendment should be adopted “immediately to reduce the unfair burden on both tribal nations and federal prosecutors.”

E. Northern Plains Indian Law Center, University of North Dakota School of Law

Assistant Professor Dan Lewerenz also submitted feedback regarding the proposed amendment to Rule 902(1) on behalf of the Northern Plains Indian Law Center at the University of North Dakota School of Law that is attached to this memorandum as Tab 5G. Professor Lewerenz also expresses strong support for the amendment. He explains that Indian tribes possess inherent government authority and sovereignty that makes them similarly situated to other governmental entities whose records are self-authenticating under Rule 902(1). Professor Lewerenz points out that tribes are imbued with greater authority than some entities already recognized under Rule 902(1): “As sovereigns, tribes are imbued with greater authority than cities, counties, or towns, which exercise only the authority delegated by states.”⁶ Although he

⁶ Interestingly, Professor Lewerenz notes that Indian tribes do not fit neatly within Rule 902(1) due to the “distinct nature of Indian Tribal sovereignty” that distinguishes them from other subordinate domestic governmental entities listed in the Rule. Nor do Indian Tribes qualify as “foreign sovereigns” within the meaning of Rule 902(3)

takes no position on the use of tribal documents in federal criminal prosecutions, Professor Lewerenz states that respect for the sovereignty of Indian tribes demands their recognition alongside other domestic entities currently listed in Rule 902(1).⁷

Professor Lewerenz argues that the diverse histories and record-keeping practices of the various federally recognized tribes do not justify excluding them from Rule 902(1). He notes that Rule 902(1) not only allows self-authentication of documents from “the sovereign State of Nebraska and of its largest municipality, Omaha, but also of Monowi, Nebraska, ‘the only incorporated place in the US with just one resident.’” Similarly, he notes that Rule 902(3) offers self-authentication to the records of stable foreign governments, such as Canada, and also to those of “failed states” such as Somalia, Yemen, and South Sudan.

Importantly, Professor Lewerenz notes that two states – New Mexico and Arizona – have already added “Federally Recognized American Indian Tribes or Nations” to their state counterparts to Rule 902(1).⁸ He notes that a similar addition has been proposed in Alaska.

Finally, Professor Lewerenz notes that a proposal to add federally recognized Indian tribes to Rule 902(1) stalled more than a decade ago due to concerns that the addition of tribal governments could affect multiple federal rules and require coordinated consideration by all Advisory Committees.⁹ He notes that there has been no comprehensive review of all the Federal Rules to address the interests of federally recognized Indian tribes and that the addition of federally recognized tribes and Nations to Rule 902(1) would not affect any other Federal Rule of Evidence or other Federal Rule. Accordingly, Professor Lewerenz states that the time is right to afford federally recognized tribes appropriate respect by making their signed and sealed documents self-authenticating.

according to Professor Lewerenz. Nonetheless, Professor Lewerenz advocates adding Indian tribes and Nations to the Rule 902(1) list of domestic public entities whose documents are self-authenticating out of respect for inherent tribal sovereignty.

⁷ Although taking no position regarding the federal criminal cases that have given rise to the proposal to amend Rule 902(1), Professor Lewerenz notes that courts continue to struggle with the use of tribal records in federal criminal cases, citing *United States v. Hartley*, 2025 WL 2553109 (10th Cir. Sept. 5, 2025) in which another conviction was overturned due to the absence of competent evidence of the defendant’s Indian affiliation as of the time of the offense. It is not clear that an amendment to Rule 902(1) would resolve the problems of proof in *Hartley*, however. In that case, a Cherokee tribal records custodian testified at trial to authenticate the tribal verification record introduced by the government, meaning that authentication was not the obstacle to the government’s proof. The Tenth Circuit pointed out that the prosecution needed both to authenticate the tribal verification record and to identify a hearsay exception to allow it to be admitted as proof of the defendant’s tribal enrollment. The court suggested that the tribal verification letter did not qualify as a business record under Rule 803(6) because it was “prepared in anticipation of litigation.” The tribal records custodian could not testify to the defendant’s tribal affiliation because he lacked personal knowledge of the fact and timing of that affiliation. In sum, self-authentication of the tribal verification record under Rule 902(1) would not have resolved the prosecution’s hearsay problem.

⁸ N.M. R. Evid. 902(1)(a) and Ariz. R. Evid. 902(1)(A) (both including the records of a “Federally Recognized American Indian Tribe or Nation”).

⁹ Professor Lewerenz notes that a proposal to exempt tribal governments from certain amicus brief requirements under the Federal Rules of Appellate Procedure earlier this year was tabled for similar reasons.

Conclusion

The potential amendment to Rule 902(1) under consideration, including a friendly amendment, is as follows:

1 (1) Domestic Public Documents That Are Sealed and Signed.

2 A document that bears:

- 3 (A) a seal purporting to be that of the United States; any state, district,
4 commonwealth, territory, or insular possession of the United States; a
5 federally recognized Indian tribe or nation; the former Panama Canal
6 Zone; the Trust Territory of the Pacific Islands; a political subdivision of
7 any of these entities; or a department, agency, or officer of any entity
8 named above; and

The DOJ also proposed the following Advisory Committee note for the Committee's consideration:

9 The rule has been amended to recognize the sovereignty of Indian tribes
10 and provide that a sealed document from a federally recognized Indian
11 tribe is entitled to the same presumption of authenticity as a comparable
12 document from the government entities currently listed in Rule 902. *See*
13 Fed. R. Crim. P. 6(e)(3)(A)(ii) and (iii), and 2002 Committee Note
14 (amendments recognize “the sovereignty of Indian tribes and the
15 possibility that it would be necessary to disclose grand-jury information to
16 appropriate tribal officials in order to enforce federal law.”). Under the
17 Federally Recognized Indian Tribe List Act of 1994 (P.L. 103-454), the
18 Secretary of the Interior publishes a list of all federally recognized Indian
19 tribes in the Federal Register.

The Arizona and New Mexico counterparts to Rule 902(1) add the records of a “Federally Recognized American Indian Tribe or Nation” to their list of approved domestic public entities, and the Committee could consider whether to align an amendment to Federal Rule of Evidence of 902(1) with the verbiage utilized by these existing state evidentiary provisions.

As outlined above, the preliminary study conducted by the FJC suggests that disputes regarding tribal affiliation and problems of proof in federal criminal trials may not be widespread. Still, preliminary feedback from tribal leaders suggests strong support for an amendment to Rule 902(1) that would render the records of federally recognized American Indian tribes and nations self-authenticating. The Administrative Office of the United States Courts has expanded outreach to all federally recognized tribes to ensure a full opportunity for tribal leaders to be heard before the Committee considers whether to publish a proposed amendment to Rule 902(1) at the Spring 2026 meeting. The Committee will be updated on any additional tribal feedback received prior to the Spring 2026 meeting.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JOHN D. BATES
CHAIR

CAROLYN A. DUBAY
SECRETARY

JESSE M. FURMAN
CHAIR
ADVISORY COMMITTEE
ON EVIDENCE RULES

May 23, 2025

Dear Tribal Leader:

I am writing in my capacity as Chair of the Judicial Conference Advisory Committee on Evidence Rules (“the Committee”) to seek your input on a proposal to amend the Federal Rules of Evidence to add federally recognized tribes to the list of entities from which a sealed and signed document would be self-authenticating if offered as evidence in federal court.

Federal Rule of Evidence 902(1) currently provides that a document is self-authenticating (and thus requires no extrinsic evidence of authenticity to be admitted in federal court) if it bears a signature and “a seal . . . of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above.” At its meeting earlier this month, the Committee considered a proposal that would add to this list “a federally recognized Indian tribe or Nation” and concluded that input from the tribal community would be helpful.

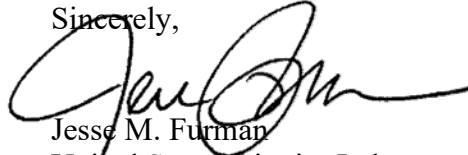
The Committee considered, but took no action on, a similar proposal in 2013. In light of intervening developments (and a suggestion from the Honorable Gregory Frizzell, United States District Judge for the Northern District of Oklahoma), however, the Committee has agreed to revisit the issue now. First, the Supreme Court’s decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020), has greatly expanded the number of federal criminal cases in which proof of Indian status is required to support federal jurisdiction. Second, last year, the United States Court of Appeals for the Tenth Circuit overturned two criminal convictions due to the prosecution’s failure to authenticate the records of Indian tribes. See *United States v. Harper*, 118 F.4th 1288 (10th Cir. 2024); *United States v. Wood*, 109 F.4th 1253 (10th Cir. 2024).

In aid of the Committee’s further consideration of this issue at its meeting in November 2025, I write to invite your input on the proposal. For purposes of background, I attach two letters that were submitted to the Committee in advance of its recent meeting: one supporting the proposal from the United States Department of Justice and one opposing the proposal from the Federal Public Defenders in the Districts of Nevada and Arizona. It is important to note that, while these

letters focus primarily on the implications for criminal cases, Rule 902(1) applies to both criminal *and* civil cases in federal court.

Please submit your written views and suggestions concerning the proposal to the office of Rules Committee Staff at RulesCommittee_Secretary@ao.uscourts.gov no later than **Friday, September 5, 2025**. The Committee welcomes individual or joint submissions. Thank you for considering this request and for your interest in the federal rulemaking process.

Sincerely,

A handwritten signature in black ink, appearing to read "Jesse M. Furman", written over the printed name.

Jesse M. Furman
United States District Judge
United States District Court
Southern District of New York
Chair, Judicial Conference Advisory Committee on
Evidence Rules

Enclosures



March 28, 2025

Hon. Jesse Furman
Chair, Advisory Committee on the Rules of Evidence
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Federal Rule of Evidence 902

Dear Judge Furman:

We write to support an amendment to Federal Rule of Evidence 902(1) that would add federally recognized tribes to the list of governmental entities that can provide sealed and signed documents for self-authentication. As we explain below, there is no reason to exclude documents of federally recognized tribes from the types of domestic public documents that are currently self-authenticating.

Background:

(1) Tribal Documents

Federally recognized Tribes, like other sovereigns, regularly issue a variety of documents in carrying out their governmental functions, and the federal government regularly relies on such documents. Documents related to tribal membership are of particular importance in federal prosecutions because federal criminal jurisdiction in Indian country is both created and limited by federal law. Federal criminal jurisdiction dependent on the Indian status of a defendant and victim can be found in the General Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153. Pursuant to both Acts, Indian status is an essential element, “which the government must allege in the indictment and prove beyond a reasonable doubt.”¹ In proving this essential element, the government must prove, first, that the defendant has “some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized Tribe,” and second, the government must establish that the defendant has “membership in, or affiliation with, a federally recognized tribe.”² A Certificate of Indian Blood or Tribal Certificate (“tribal certificate”) often

¹ See *United States v. Rainbow*, 813 F.3d 1097, 1103 (8th Cir. 2016); *United States v. Prentiss*, 273 F.3d 1277, 1280-1281 (10th Cir. 2001).

² See *United States v. Rogers*, 45 U.S. 567 (1846).

satisfies proof of Indian status because the tribal certificate contains proof of Indian blood as well as membership in a federally recognized tribe. At present, the government must use extrinsic evidence to authenticate a tribal certificate before it can be introduced.

(2) Federal Rule of Evidence 902(1)

Federal Rule of Evidence (“FRE”) 902(1) provides that the sealed and signed documents of an expansive list of governmental entities are self-authenticating, such that no other extrinsic evidence is required to establish their authenticity. The covered governmental entities include “any state, district, commonwealth, territory, or insular possession of the United States; a political subdivision of any of these entities; or a department, agency, or officer of any [such] entity.” Fed. R. Evid. 902(1)(A).

By contrast, and even though the United States “recognizes the sovereignty of” and “maintains a government-to-government relationship with” all federally recognized tribes,³ Rule 902(1) does not recognize sealed and signed documents of federally recognized tribes as self-authenticating. Both the Ninth and the Tenth Circuits – which include the majority of federally recognized tribes – have confirmed that, under the “plain language of Rule 902(1),” tribal documents are not self-authenticating.⁴ In these cases, courts have reversed convictions after finding that they rested on tribal documents that were not properly authenticated.

In 2013, the Advisory Committee on Evidence Rules (Evidence Committee) considered amending 902(1)(A) to include federally recognized tribes but decided not to do so at that time. The concern was that amending FRE 902(1) in isolation would impact other rules that exclude tribes. The Committee therefore determined that the “treatment of Indian tribal documents raised a question that spanned all the national rules, and therefore it would await the direction of the Standing Committee.”⁵ When this was reported at the Standing Committee meeting later that year, Judge Sutton (then-Chair of the Standing Committee) indicated that the “practical concerns” raised by Rule 902(1)’s omission of Indian tribes “placed [it] in a different category” from other rules, and so “some action by the Evidence Rules Advisory Committee might be warranted” as to this Rule.⁶

³ Federally Recognized Indian Tribe List Act of 1994, P.L. 103-454 (Nov. 2, 1994).

⁴ *United States v. Alvarez*, 831 F.3d 1115 (9th Cir. 2016); *see also United States v. Harper*, 118 F.4th 1288 (10th Cir. 2024); *United States v. Wood*, 109 F.4th 1253 (10th Cir. 2024); *United States v. PMB*, 660 Fed.Appx. 521 (9th Cir. 2016).

⁵ *Minutes of Advisory Committee on Evidence Rules*, JUDICIAL CONFERENCE (May 3, 2013), at 10-12, https://www.uscourts.gov/sites/default/files/fr_import/2013-05-Evidence-Minutes.pdf.

⁶ *Minutes of Committee on Rules of Practice and Procedure*, JUDICIARY CONFERENCE (June 3-4, 2014), at 10-12, https://www.uscourts.gov/sites/default/files/fr_import/ST06-2013-min.pdf.

These “practical concerns” are underscored by the Tenth Circuit’s recent reversals of convictions due to their reliance on tribal records that were not properly authenticated. In these cases, as in the earlier Ninth Circuit cases, there does not seem to be any question of the *actual* authenticity of the tribal records but only of the adequacy of the authentication.⁷

Reasons for Adding Federally Recognized Tribes to FRE 902(1)

(1) *Logic*. Clearly, “it is anomalous that self-authentication is granted to cities and, for example, the Trust Territory of the Pacific Islands, but not to Indian tribes.”⁸ And there is precedent for adding federally recognized tribes to the list of governmental entities initially included in a specific federal rule. Federal Rule of Criminal Procedure 6(e)(3) – addressing the circumstances under which the government may disclose matters occurring before the grand jury – authorizes disclosure of grand jury materials to federally recognized tribes to the same extent disclosure may be authorized to state, state subdivision, or foreign governments.⁹ The Rule was amended in 2002 to include federally recognized tribes, and the Advisory Notes explain that this was done to recognize both “the sovereignty of Indian tribes” and the potential need “to disclose grand jury information to appropriate tribal officials” to support enforcement of federal or tribal laws.¹⁰ There is no logical reason why federally recognized tribes should be excluded from the category of governmental records that is self-authenticating, when they were added long ago to the governmental officials entitled to access grand jury information.

(2) *Reliability*. At the last meeting of this committee, and in 2013, some members suggested that adding federal recognized tribes to FRE 902(1) would be inappropriate because “Indian tribes might vary in their degree of rigor in maintaining public documents.”¹¹ But it is not

⁷ See, e.g., *Alvarez*, 831 F.3d at 1120, 22-23 (reversing conviction for assault with serious injury because sealed Certificate of Indian Blood issued by Colorado River Indian Tribes was not self-authenticating and could not be authenticated by officer of Hualapai Nation); *Harper*, 118 F.4th at 1296-1300 (reversing conviction for kidnapping, aggravated sexual abuse and assault certified because letter from Choctaw Nation of Oklahoma verifying defendant’s tribal membership and tribe’s possession of defendant’s Certificate of Degree of Indian Blood not self-authenticating and not properly authenticated); *Wood*, 109 F.4th at 1257-58 (reversing conviction for assault resulting in serious bodily injury and assault with a dangerous weapon with intent to do bodily harm because tribal Certificate of Indian Blood was neither self-authenticating nor properly authenticated); *PMB*, 660 Fed.Appx. at 523 (reversing conviction for aggravated sexual abuse sealed certificate of tribal enrollment issued by Navajo Nation was not self-authenticating and could not be authenticated by FBI agent).

⁸ *May 2013 Evidence Committee Minutes*, at 10.

⁹ Fed. R. Crim. P. 6(e)(3)(A)(ii); Fed. R. Crim. P. 6(e)(3)(E)(iv).

¹⁰ Fed. R. Crim. P. 6(e)(3)(A)(ii), Committee Notes on Rules – 2002 Amendment.

¹¹ *May 2013 Evidence Committee Minutes*, at 11.

clear why this would be more of a concern for federally recognized Indian tribes than for the multiple governmental entities listed in Rule 902(1)(A), when the reliability of these entities' record-keeping practices undoubtedly vary. The current rule, for example, permits self-authentication for political subdivisions of remote territories overseas without any evidence that those political units keep reliable records. Indeed, it appears that there was no analysis of disparate record-keeping practices when the Rules of Evidence were first adopted in 1972. Indeed, the list of covered entities in FRE 902(1) has not been revised since the initial adoption of the Rules, and at that time, the list was drafted in purposely broad terms without regard to the specific recordkeeping practices of the listed entities.¹² Federally recognized tribes, moreover, have at least as strong an incentive to keep reliable records as any other governmental unit, particularly as to their membership and governmental structure. Tribes set criteria for enrollment and maintain related records, which are critical to their government-to-government relationships with the United States and for determining the benefits to which tribes and their members may be entitled.¹³

The federal government also recognizes the reliability of tribal recordkeeping by accepting tribal documents for multiple purposes. The Transportation Security Administration, for example, “accepts IDs from Federally recognized Tribes” for airport security screening, and “Native American tribal documents” from federally recognized tribes can be used for employment verification purposes. TSA does not distinguish among tribes based on the purported reliability of their record systems. *See, e.g.,* <https://www.tsa.gov/travel/tsa-cares/tribal-and-indigenous#:~:text=TSA%20accepts%20IDs%20from%20Federally,referenced%20with%20the%20Federal%20Register>; US Citizenship & Immigration Services, Handbook for Employers M-274, at 7.2, <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/70-evidence-of-employment-authorization-for-certain-categories/72-native-americans>. And multiple states – including Arizona, New Mexico, Oregon, Washington, and Wisconsin – have amended their evidentiary rules, or enacted statutes, to provide for self-authentication of sealed and signed tribal documents.¹⁴ These states do not distinguish among federally recognized tribes in providing for the self-authentication of their documents.

¹² Fed. R. Evid. 902(1), Advisory Committee Notes to 1972 Proposed Rules (recognizing broad acceptance of documents bearing a public seal and the “practical underlying considerations ... that forgery is a crime and detection is fairly easy and certain”).

¹³ *See generally* <https://www.doi.gov/tribes/enrollment> (tribally established membership criteria are “set forth in tribal constitutions, articles of incorporation or ordinances”); *see also* <https://www.bia.gov/bia/ois/tgs> (Department of the Interior assists tribes “with the resources they need to foster strong and stable Tribal governments,” including through self-determination contracts to perform government services that might otherwise be handled by federal agency).

¹⁴ Ariz. R. Evid. 902(1)(A); N.M.R. Evid. 11-902(1)(A); Or. Rev. Stat. Ann. § 40.510(k)(A); Wis. Stat. Ann. § 806.245(2); Wash. Rev. Code Ann. §§ 5.44.010, 5.44.050, 5.44.050.

(3) *Burden and Cost.* The current need to have a tribal official travel to the courthouse to authenticate routine governmental documents creates unnecessary burdens and costs. Indian country is vast, and witnesses often travel from hundreds of miles away to testify for five minutes. The cost of mileage/airfare, lodging, and incidentals can be upwards of \$800 per trip. Multiplied by the number of times tribal documents need to be introduced and authenticated in criminal cases, these unnecessary journeys result in an enormous waste of time and taxpayer dollars. As one citizen of the Choctaw Nation of Oklahoma wrote,

One of the primary methods of verifying tribal documents ... is testimony at trial by a tribal membership officer, who can attest to the accuracy of the documents. This takes valuable time away from these tribal officials, complicates the jobs of prosecutors, and forces courts to dedicate resources to these disputes, even when those resources could be better allocated elsewhere.¹⁵

The burden, moreover, not only affects prosecutors, but impacts defendants as well. Because tribes have exclusive jurisdiction over some crimes where both defendant and victim are Indian for purposes of criminal law, defendants charged in federal court may seek to establish their own or a victim's Indian status in order to challenge federal jurisdiction.¹⁶ *See also* Henry Oostrom-Shah, "Authentic" from Time Immemorial: Reforming Rule of Evidence 902 to Reflect Tribal Sovereignty, 58 ARIZONA ATTORNEY 40 (2022) (attached) ("When a criminal defendant cannot prove his tribal citizenship, a judge may transfer his case from a tribal legal system to the Anglo-American courts, where he may face harsher penalties in front of a non-Native judge and jury.")

And the burden extends beyond criminal cases. The need to authenticate sealed and signed tribal records is also an issue in civil cases. There, both the parties and the court are forced to expend resources obtaining, introducing, and reviewing the adequacy of extrinsic evidence to establish a particular record's authenticity. *See, e.g., Manzano v. Southern Indian Health Council, Inc.*, 2021 WL 2826072, at *4-5 (S.D. Cal. 2021) (engaging in lengthy analysis of adequacy of extrinsic evidence to support authenticity of tribal compact). These problems may be exacerbated where the federally recognized tribe that issued the records is not a party to the litigation, or where it is not possible for parties to secure witnesses who are able to authenticate such documents.

¹⁵ Crispin South, *Unjustifiable Expense: Tribal Nations Should be Included in FRE 902(1)*, ARIZONA STATE LAW JOURNAL (Nov. 2, 2024), [Unjustifiable Expense: Tribal Nations Should be Included in FRE 902\(1\) – Arizona State Law Journal](#).

¹⁶ *Id.*

Proposed Draft

Of the two drafts proposed in the prior committee memorandum on this topic, we recommend the first and most straight-forward version, set forth below. This version treats federally-recognized tribes as equivalent to the other government entities listed in the rule. The alternative version, for no demonstrated reason, distinguishes tribes from the other listed entities by eliminating self-authentication for “political subdivisions.” In the committee note, we suggest a reference to the list of federally recognized tribes published in the Federal Register, and one stylistic edit.

(1) Domestic Public Documents That Are Sealed and Signed.

A document that bears:

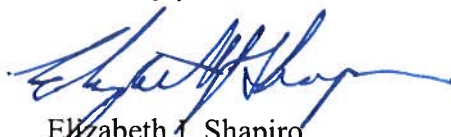
- (A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; **a federally-recognized Indian tribe**; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

Draft Committee Note:

The rule has been amended to recognize the sovereignty of Indian tribes and ~~the fact that a~~ **provide that a** sealed document from a federally-recognized Indian tribe is entitled to the same presumption of authenticity as a comparable document from the government entities currently listed in Rule 902. *See* Fed. R. Crim. P. 6(e)(3)(A)(ii) and (iii), and 2002 Committee Note (amendments recognize “the sovereignty of Indian tribes and the possibility that it would be necessary to disclose grand-jury information to appropriate tribal officials in order to enforce federal law.”). Under the Federally Recognized Indian Tribe List Act of 1994 (P.L. 103-454), the Secretary of the Interior publishes a list of all federally recognized Indian tribes in the Federal Register.

We look forward to discussing these issues further in our upcoming meeting.

Sincerely yours,



Elizabeth J. Shapiro
U.S. Department of Justice

58-AUG Ariz. Att’y 40

Arizona Attorney

July/August, 2022

Feature

Special Feature

Indian Law

Special Focus on Indian Law

Henry Oostrom-Shah^{al}

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“AUTHENTIC” FROM TIME IMMEMORIAL

Reforming **Rule of Evidence 902** to Reflect Tribal Sovereignty

“If I get arrested when I’m in Arizona, how will the court know I’m Navajo? I don’t want to end up back in state jail--I want to be with other tribal folks.”

I was speaking to my client in front of the tribal jail after he served time for yet another misdemeanor charge. He was excited to be released and leave Montana for a road trip to visit relatives in Tséhootsooí (Fort Defiance) on the Arizona side of Navajo Nation. But he also worried about running into law enforcement when he got there.

I had nothing to soothe his anxieties. I had only the dreaded, if frequently invoked, answer of the legally trained: “It depends.”

That Navajo client is sometimes required to produce evidence to prove his tribal citizenship when he arrives in court. Depending on whether the court’s evidence rules allow for self-authentication of tribal government documents, that often-homeless client must find a way to get a witness qualified to authenticate his tribal ID, his Certificate of Indian Blood (CDIB), or other papers showing he’s an enrolled Navajo member.

Tribal citizens face a checkerboard of conflicting rules. If my client appears in Navajo tribal court, the judge’s discretion governs authentication.¹ If he appears in Arizona state court,

Arizona's self-authentication rule does not explicitly allow self-authentication of tribal government documents.² Nor would the evidence rules of federal courts in Arizona clearly allow self-authentication. Even some tribal courts in Arizona do not expressly permit for self-authentication, including the Fort McDowell Yavapai Nation through whose jurisdiction my client planned to drive on his way to Phoenix.³

Recognition of tribal citizenship means the world to Native people and to courts. When a mother cannot prove her daughter's tribal affiliation, courts might sever the bonds of parenthood under the Indian Child Welfare Act. When a criminal defendant cannot prove his tribal citizenship, a judge may transfer his case from a tribal legal system to the Anglo-American courts, where he may face harsher penalties in front of a non-Native judge and jury. When a landowner cannot prove her tribal status, she might lose a claim to the land her ancestors roved freely for millennia. When indigenous religious practitioners fail to substantiate their claims to a holy site (as at Oak Flat), the federal government might take the site, transfer it to a foreign mining conglomerate, and turn the dwelling place of the Creator's messengers into a gaping crater.

These practical consequences sharpen the need for evidence rules that create consistent--and consistently affirming--standards of proof for tribal nations and their citizens. But by complicating this recognition, conflicting authentication rules flout tribal sovereignty.

For starters, the Diné people and Navajo Nation's sovereignty existed long before they signed treaties with the federal government, and long before Arizona became a state. Tribal sovereignty is inherent from time immemorial. According to the law of the Navajo Nation, "The fundamental laws ... remain unchanged," and Navajo citizens "remain Diné forever."⁴ This Navajo legal provision reflects the consistent legal understanding that tribal sovereignty does not derive from the federal government or any state. Accordingly, legal recognition of Diné belonging should not depend on the unpredictability of federal or state evidentiary standards.

The State of Arizona should change [Rule of Evidence 902](#) to affirm the meaning of tribal citizenship. [Rule 902](#) should unambiguously provide for the self-authentication of all documents issued by tribal governments, just like the documents of tribes' federal, state and local counterparts.

Arizona's Advisory Committee need look only as far as neighboring New Mexico when drafting amendments to [Rule 902](#). New Mexico classifies all documents of "Recognized American Indian Tribe[s] or Nation[s]" as "Domestic Public Documents." New Mexico [Rule 902](#) thus allows self-authentication of documents that either: (1) bear a seal and signature of the tribal government and its employee(s); or (2) bear no seal but are signed by a tribal government employee and have been certified as genuine by another tribal government employee with the authority to establish *42 the tribal seal. New Mexico's model has several advantages:

¶ New Mexico's [Rule 902](#) is unambiguous about the inclusion of tribal government documents.

¶ New Mexico's rule places federally, tribally and state-issued documents on equal footing as parties seek to admit government documents without authentication. This structure most accurately reflects the status of tribes as both "domestic" and also "nations" with government-to-government relationships with both federal and state entities.

¶ New Mexico's rule is more expansive than options in other states. New Mexico's [Rule 902](#) does not restrict self-authentication to documents issued only by federally recognized tribes. Other states with tribal-friendly [Rule 902](#) analogues, like Oregon, bar self-authentication for documents issued by state-recognized tribes. Some of these tribes gain federal recognition after a long struggle. When these tribes gain recognition, their members should be able to freely use their tribal government documents in legal proceedings, even if those documents were issued prior to federal recognition. After all, federal recognition just overlays the inherent sovereignty that has existed since time immemorial.

Arizona, unlike other states, has a rules amendment process that aids citizen participation. [Rule 28 of the Arizona Rules of the Supreme Court](#) allows "any person" to petition to amend any court rule. The Arizona Advisory Committee on Rules of Evidence meets regularly year-round to review all amendment proposals and recommend revisions to the Arizona Supreme Court. Native nations within Arizona's boundaries might consider convening to discuss amendments to [Rule 902](#) and other state evidentiary standards that burden tribal governments and citizens.

Arizona's particularities sharpen the need for changes to [Rule 902](#). Arizona has more Native Americans than all but two other states. Twenty-two tribal nations operate legal systems within Arizona's borders. And some of those individual tribal nations in Arizona, like the Apache and Navajo, have relatives across state borders. The Navajo Nation's boundaries span three states, and each has different authentication rules. A Navajo document can be self-authenticated in state court in New Mexico, but that exact same document cannot be self-authenticated in Arizona.

So too should federal judges in Arizona allow self-authentication of tribal government documents under [Rule 902](#). They need not adhere to the Ninth Circuit's decision in *United States v. Alvarez*.⁵ In that case, the government successfully introduced the defendant's CDIB to prove

essential facts that brought the case under federal Indian Country jurisdiction. On appeal, the Ninth Circuit rejected admission of the defendant's Certificate, holding that the "plain language" of [Federal Rule of Evidence 902\(1\)](#) "specifically lists the entities that may issue self-authenticating documents."⁶ The court reasoned that, because tribal governments do not figure on the list, tribal governments cannot produce self-authenticating documents. The *Alvirez* court fundamentally misunderstood the nature of the documents at issue. CDIBs are federal documents, not tribal government documents.⁷ Following even a narrow reading of [Federal Rule of Evidence 902\(1\)](#), the *Alvirez* court should have come out the other way and allowed admission of the defendant's CDIB.

The *Alvirez* decision sparked well-deserved concern from distinguished commentators.

Ninth Circuit Judge Andy Hurwitz, a former member of the federal Advisory Committee on Evidence Rules, wrote to Committee Reporter Professor Daniel Capra. Judge Hurwitz suggested that the *Alvirez* court's interpretation of [Rule 902](#) was "unnecessarily denigrating of tribal sovereignty."⁸ Beyond any concerns about the dignity of tribal nations, Judge Hurwitz assessed the court's logic as "silly" because the Navajo Nation's documents could not be self-authenticated, while a small New Jersey town's documents could be.⁹

And not just silly, but inconsistent: Professor Wenona Sengel noted that the Department of Homeland Security accepts any and all "current tribal documents" as adequate forms of ID and citizenship at the border, just so long as the document has a photo attached.¹⁰ Furthermore, the Transportation Security Administration accepts any "Native American Tribal Photo ID" at airport security checkpoints.¹¹

Yet when the Advisory Committee on Evidence Rules took the matter up for discussion, they "resolved unanimously that it would be unwise to proceed." The committee delayed action after judging the "problem ... not significant," questioning the "degree of rigor" that tribal governments displayed in maintaining official documents, raising the need for a "process of consultation" with tribes, and suggesting that amendments would push other federal rules committees down the slippery slope of full consideration of tribal sovereignty.

In the end, it seems that the latter concern won out. Because the question "spanned all the national rules" within the federal courts, evidentiary and otherwise, the committee punted for further direction from above.¹² The far-reaching scope of the problem does not limit the need for change--it amplifies the urgent call for full legal recognition of tribal sovereignty.

Pending future committee consideration, federal judges in Arizona should follow more recent Ninth Circuit precedent in *United States v. Mancha*,¹³ where, in an appeal from an Indian Country prosecution, the Ninth Circuit took judicial notice of the defendant's Blackfeet Indian Tribe enrollment certificate. Although the court did not spell out its reasoning, basic principles of tribal sovereignty and evidence law support *43 the panel's conclusion.

The sovereign authority of the Blackfeet and other tribal nations is precisely the sort of fact that yields judicial notice under Federal Rule 201(b). The Blackfeet Tribe's sovereign authority to issue membership documents like the enrollment certificate is both "generally known within the trial court's territorial jurisdiction" as well as "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The *Mancha* method allows for self-authentication in Arizona's federal courts without contradicting binding, if faulty, precedent.

Difficulties with authentication do not reflect a general reluctance of the crafters of federal or state evidentiary rules to allow self-authentication. Under federal and state [Rules 902](#), my client wouldn't need an authenticating witness if he wanted to admit into evidence a document from his 100-person town in rural Montana, some 1,000 miles from Arizona. He wouldn't even need such a witness if he wanted to admit into evidence a document issued by the administration of Guam, the non-state insular possession of the United States where he was stationed during his military service.

Amending [Rule 902](#) is an easy fix that carries real consequences. And evidence rules should not stand still while recognition of tribal sovereign authority keeps growing. The *McGirt* decision,¹⁴ federal recognition of the Little Shell Tribe in Montana, reaffirmation of the Mashpee Wampanoag Tribe's reservation and other recent events show that federal and state governments cannot ignore the everyday realities of tribal governance. Nor should the crafters of Arizona's and other evidence rules remain idle. They should affirm full recognition of tribal sovereign authority by amending their evidence rules to explicitly provide for self-authentication of tribal documents.

Tribal nations have been authentically sovereign since time immemorial. It's long past time that rules of evidence catch up to that truth.

Footnotes

^{a1} **HENRY OOSTROM-SHAH** is a 2L at Boston University School of Law. Many people contributed to this inquiry into evidentiary injustice, notably: the citizens of the Confederated Salish & Kootenai Tribes of the Flathead Nation, Prof. Jasmine Gonzales Rose, Prof. Ann Tweedy, Ann Miller, Claire Charlo, Shanley Swanson, Sage Nicolai, Michele Moretti, Dan Kaplan, and Doug Mo.

¹ Navajo R. Evid. 30.

² [Ariz. R. Evid. 902](#).

3 Fort McDowell Yavapai R. Evid. 39.

4 1 N.N.C. § 201.

5 831 F.3d 1115, 1123 (9th Cir. 2016).

6 *Id.*

7 See Certificate of Indian or Alaska Native Blood, Certificate of Indian or Alaska Native
Blood, 65 Fed. Reg. 20775, 20776 (April 18, 2000) ("[The Bureau of Indian Affairs]
issue[s] CDIBs so that individuals may establish their eligibility for those programs and
services based upon their status as American Indians[.]")

8 Advisory Committee on Evidence Rules, Tab 4, May 3, 2013, Coral Gables, Fla.,
available at <https://bit.ly/3N0KbVs>.

9 *Id.*

10 *Id.*

11 *Id.*

12 Advisory Committee on Evidence Rules. Minutes of the Meeting of May 3, 2013, Coral
Gables, Fla., available at <https://bit.ly/3tIBus0>.

13 773 Fed. Appx. 447, 448 (9th Cir. 2019).

14 *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452, 2459 (2020).

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April 3, 2025

Hon. Jesse M. Furman
Chair, Advisory Committee on the Rules of Evidence
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed Amendment to Federal Rule of Evidence 902

Dear Judge Furman:

We write to urge the Advisory Committee on the Rules of Evidence (“Advisory Committee”) to reject the proposed amendment to Rule 902 of the Federal Rules of Evidence relating to self-authenticating documents. This proposal would add “*a federally-recognized Indian tribe*” to the list of entities whose documents are self-authenticating. In 2013, the Advisory Committee considered an identical proposal and rejected it. Nothing has changed in the last twelve years that merits revisiting the Advisory Committee’s original decision to forego changes in the Rule.

As will be outlined below, this proposed amendment, while undoubtedly well-intentioned, is insufficiently informed by, and insufficiently considerate of, the diversity of Native tribes. Moreover, the amendment is unnecessary, given that the Rules of Evidence already provide multiple mechanisms to properly admit evidence of Indian status that the government has used successfully for decades in prosecutions of Indian defendants. The government has pointed to two cases out of the Northern District of Oklahoma where it recently failed to make the proper showing. However, only one of those two cases implicated Rule 902 at all, and in that case, the sole issue was a failure by the local federal prosecutors to comply with the notice requirements of Rule 902(11), not a general inability to authenticate documents using presently available rules. To the extent that any difficulty exists, it appears to be a localized issue in a single jurisdiction that has only recently begun to see significant numbers of Indian jurisdiction cases and does not have sufficient familiarity with relevant documents and applicable Rules.

If the Advisory Committee is interested in amendments to Rule 902, we ask the Advisory

Committee to refrain from taking any action without *first*, consulting with representatives from Indian Tribes and *second*, undertaking a thorough and comprehensive study to determine how widespread the problem of authentication is.

BACKGROUND

I. Proof of Indian Status

A person's Indian status triggers federal criminal jurisdiction in two situations. First, 18 U.S.C. § 1153 grants jurisdiction to federal courts over Indians who commit any one of more than a dozen enumerated offenses when those offenses occur in Indian country.¹ In such cases, the defendant's Indian status is an element of the crime.² Second, in cases where the defendant is not an Indian, but the crime occurs in Indian country and involves an Indian victim, jurisdiction arises under 18 U.S.C. § 1152, and the victim's Indian status is an element of the crime.³

The two jurisdictional statutes do not define the term "Indian;" however, courts generally agree on a two-part test to determine someone's Indian status: (1) does the individual have a degree of Indian blood; and (2) is he recognized as an Indian by the tribe or by the government.⁴ As with all elements of an offense, the burden falls on the Government to prove beyond a reasonable doubt a defendant's Indian status.⁵

With respect to the first factor – degree of Indian blood – courts have held that, "Indian status is a political classification, not a racial or ethnic one. Indian status requires... proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe."⁶ As to the second factor – recognition by the tribe or by the government – Indian status requires proof of a "link to a federally recognized tribe."⁷ This link can be shown through proof of "(1) enrollment in a federally recognized tribe; (2) government recognition formally and informally through receipt of assistance available only to individuals who are members, or eligible to become members, of federally recognized tribes; (3) enjoyment of the benefits of affiliation with a federally recognized tribe; [or] (4) social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a

¹ In 1953, Congress enacted Public Law 83-280, which grants certain states criminal jurisdiction over Indians living on reservations. Those states are generally not at issue here because in those states Indian jurisdiction cases do not appear in federal court.

² See *United States v. Bagola*, 108 F.4th 722, 726 (8th Cir. 2024). In § 1152 cases, the defendant's status as an Indian is an affirmative defense to the charge. See *United States v. Bruce*, 394 F.3d 1215, 1222–23 (9th Cir. 2005).

³ See *United States v. Reza-Ramos*, 816 F.3d 1110, 1120 (9th Cir. 2016); *United States v. Walker*, 85 F.4th 973, 978 (10th Cir. 2023).

⁴ *United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015) (en banc).

⁵ *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012).

⁶ *United States v. Cooley*, 919 F.3d 1135, 1142 (9th Cir. 2019), *overruled on other grounds*, 593 U.S. 345 (2021).

⁷ *Zepeda*, 792 F.3d at 1114.

federally recognized tribe.”⁸

Typically, the government will establish a person’s Indian status in a criminal prosecution by introducing documents reflecting that the person has some degree of Indian blood and is affiliated with a tribe. With respect to blood quantum, the government may introduce a Certificate of Degree of Indian Blood (“CDIB”) issued by the Bureau of Indian Affairs (“BIA”). The BIA is a federal agency of the Department of the Interior, and CDIBs “certif[y] that an individual possesses a specified degree of Indian blood of a federally recognized Indian tribe.”⁹ CDIBs are issued by, and bear the seal of, the United States and are already self-authenticating under rule 902(1).¹⁰

With respect to the issue of tribal affiliation, prosecutors commonly introduce documents that show evidence of tribal enrollment. “Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative.”¹¹ One commonly used document is a certificate of enrollment, though there is no requirement that tribal enrollment documents be issued in any particular format, and there is wide variation among the tribes with respect to what these documents look like. An enrollment certificate introduced for the purpose of showing tribal affiliation may also suffice to establish that a person has Indian blood, even in the absence of a CDIB, because blood quantum information is sometimes included on the enrollment certificate.¹²

Unlike CDIBs issued by the BIA, enrollment certificates and other documents issued by the various Indian tribes are not self-authenticating under Rule 902.¹³ In order to introduce these documents at trial, the government either must proffer, alongside the tribal certificate, the testimony of a “custodian or other qualified witness” who can explain that the certificate reflects regularly conducted business activity relating to enrollment,” or it must furnish a certificate under Rule 902(11) before trial that explains how the document meets the requirements of the hearsay exception for records of a regularly conducted activity.¹⁴

⁸ *Id.*

⁹ *United States v. Rainbow*, 813 F.3d 1097, 1103 (8th Cir. 2016); *see also* Bureau of Indian Affairs, Certificate of Degree of Indian or Alaska Native Blood Instructions, available at https://www.bia.gov/sites/default/files/media_document/1076-0153_cdib_form_expires_05.31.2025_updatedlink_508.pdf (directing applicants to submit their CDIB application to their regional BIA office).

¹⁰ *See Harper*, 118 F.4th at 1296 (citing *Walker*, 85 F.4th at 981–82).

¹¹ *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979).

¹² *United States v. Alvarez*, 831 F.3d 1115, 1121 (9th Cir. 2016); *see also Bagola*, 108 F.4th at 727 (enrollment certificate reflected blood quantum and tribal affiliation); *Zepeda*, 792 F.3d at 1115 (enrollment certificate reflected blood quantum and tribal affiliation); *but cf. Harper*, 118 F.4th at 1297 (no CDIB or enrollment paperwork introduced).

¹³ *Alvarez*, 831 F.3d at 1123.

¹⁴ *Harper*, 118 F.4th at 1297 (discussing Fed. R. Evid. 803(6) and quoting *United States v. Wood*, 109 F.4th 1253, 1258 (10th Cir. 2024)).

ARGUMENT

The Advisory Committee should reject the proposed amendment because it is inconsistent with the history and purpose of Rule 902, does not take into account the wide variation among tribes and tribal histories, and is not necessary to address any observed deficiency in the existing rules.

I. The proposed amendment is inconsistent with the history and purpose of Rule 902.

FRE 902 was created to codify existing caselaw holding that certain records were self-authenticating “because practical considerations reduce the possibility of unauthenticity to a very small dimension.”¹⁵ Rule 902(1), which allows for the self-authentication of “documents bearing a public seal and signature” was justified specifically by “the practical underlying considerations . . . that forgery is a crime and detection is fairly easy and certain.”¹⁶ Where there could be “greater ease of effecting a forgery,” however, such as where documents are signed but not sealed, more is required in order to authenticate the document.¹⁷

With this background in mind, it appears that the Advisory Committee presently lacks information sufficient to determine that “the possibility of unauthenticity” of tribal documents would be of a similarly “small dimension.” This is especially true given that (1) tribal documents are not subject to FOIA requests,¹⁸ and many tribes have no tribal public records laws (2) tribal sovereign immunity may place relevant documents beyond the reach of subpoenas by private parties,¹⁹ (3) tribes have no jurisdiction to prosecute non-Indian defendants—or Indian defendants who commit crimes on non-Indian land—for forgery, and (4) federal prosecutions for forgery or obstruction of justice require proof of additional elements, such as “intent to defraud the United States,”²⁰ that can render the threat of federal prosecution less effective. By contrast, every state or territory has adopted a public records law allowing members of the public, including non-residents, to obtain documents and other public records from state and local governments. State records and state officials are subject to subpoena, and there are few legal barriers to prosecuting people for forgery of state documents.

In sum, different treatment of tribes under the Rule is justified given the history and purpose of the Rule and the different legal status of tribes compared to entities currently covered under the Rule.

¹⁵ Fed. R. Evid. 902, Advisory Committee Notes.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 42 CFR § 137.176.

¹⁹ As a matter of law, a federally recognized tribe “is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” *Kiowa Tribe of Okla. v. Mfg. Techs.*, 523 U.S. 751, 754 (1998).

²⁰ 18 U.S.C. § 495.

II. The proposed amendment ignores the diverse histories of tribal-government relations.

There are 574 federally recognized Indian tribes in the United States.²¹ Although each of these tribes has at some point been recognized by the federal government, none of these tribes is a creation of the federal government. Each and every one is comprised of descendants of the people who inhabited the territorial lands of the United States for thousands of years before the widespread arrival of European settlers.

To provide one example, the Little Shell Tribe of Chippewa Indians did not gain federal recognition until December 20, 2019.²² Undoubtedly, the tribe possesses many records that predate this formal recognition. The proposed amendment provides little assistance to courts or litigants in determining whether tribal documents created prior to December 20, 2019, yet bearing appropriate seals and signatures, should be considered self-authenticating under the Rule. More complicated yet, the Ottawa Tribe of Oklahoma's reservation was created by treaty in 1867, terminated in the 1890s by the Dawes Act, reestablished in 1936 by the Oklahoma Indian Welfare Act, terminated again in 1956 by the Ottawa Termination Act, and finally reestablished again in 1978 by the 1978 Reinstatement Act.²³ It is unclear from the language of the proposed amendment whether documents from each of these historical periods should be treated the same or differently under the Rule.

Without a more nuanced understanding of the universe of tribes and tribal documents potentially affected by the amendment, the amendment risks introducing uncertainty into a system that is, at the present time, easily understood by all parties.

III. The proposed amendment fails to appreciate the wide disparity in recordkeeping practices and recordkeeping capacity among tribes.

The proposed amendment also fails to appreciate the diversity in recordkeeping practices among tribes. Undoubtedly, some tribes keep excellent records. And some tribes who previously struggled with recordkeeping have made tremendous progress. The Hocak Nation, for example, currently has a high-quality tribal records management program and gives presentations about best practices in tribal records management.²⁴ The Hocak Nation was not, however, always a success story. It did not have any records management program at all prior to 1993.²⁵ When the tribe first implemented its records management program, the Hocak record manager had to begin by “sorting through papers/documents in pest-infested basements, storage units and garages all around Wisconsin”

²¹ *Indian Tribes Recognized by and Eligible to Receive Services*, 89 Fed. Reg. 99899 (Dec. 11, 2024).

²² Kathleen McLaughlin, *A Big Moment Finally Comes for the Little Shell: Federal Recognition of Their Tribe*, THE WASH. POST (Dec. 21, 2019).

²³ *See generally Oklahoma v. Brester*, 531 P.3d 125 (Okla. Crim. App. 2023) (discussing the termination and reestablishment of the tribe)

²⁴ *See* Denise Redbird and Bethany Redbird, Hocak Nation Records Managers, Presentation at the Association of Tribal Archives, Libraries and Museums Annual Conference: Tribal Records Management 102 (Sept. 9–12, 2015), available at <https://www.youtube.com/watch?v=retaN8KDs3M>.

²⁵ *Id.*

without any clear idea of what she might find.²⁶ Unfortunately, there are many tribes today that are still in the same position that the Hocak Nation was in 1993, including tribes that lack funds sufficient to buy filing cabinets.

Among the 574 federally recognized tribes, there are many who have admirable recordkeeping practices. There are many others that fall short of desired completeness, accuracy, and reliability. A rule that affords all public records from all 574 the same presumption of authenticity without any serious inquiry or investigation into the variety of recordkeeping practices among various groups risks unfair prejudice to litigants, who have limited legal options for investigating any potential or perceived irregularity in the documents.

IV. The proposed amendment is not necessary to solve any problem that currently exists under the Rules.

The Rules already provide a mechanism under Rule 902(11) for tribal records to be admitted absent testimony by a live witness. Instead of a seal and a signature, Rule 902(11) simply requires that the “custodian or another qualified person” certify that the record “meets the requirements of Rule 803(6) (A)–(C),” and requires the proponent to provide “reasonable written notice of the intent to offer the record [and to] make the record and certification available for inspection.”

It is unclear, and the Government has made no attempt to explain, why Rule 902(11) is impracticable or unworkable. Of the four cases the government cites in support of the need to reform the rule, only one of the cases—*United States v. Wood*, 109 F.4th 1253 (10th Cir. 2024)—involved a failed attempt to use Rule 902(11) to authenticate tribal documents. And in that case, the issue was not that the documents could not be authenticated under the Rule, it was that the government simply failed to comply with the notice requirement. *United States v. Harper*, 118 F.4th 1288 (10th Cir. 2024), on the other hand, did not involve Rule 902 at all. In that case, the tribal custodian and author of the contested piece of evidence testified at trial and authenticated the document. On appeal, the defendant did not raise an authentication challenge. Instead, the defendant’s conviction in *Harper* was overturned because the letter on which the government relied to prove enrollment was hearsay that did not meet the requirements of Rule 803(6).²⁷ In sum, while the losses in *Wood* and *Harper* are no doubt frustrating for the Government, neither case supports an inference that tribal records are unreasonably difficult to authenticate under the current Rules.

Indeed, experience shows that they are not.²⁸ There is a long history of federal prosecutors successfully complying with these rules in the course of prosecuting cases under §§ 1152 and 1153. In

²⁶ *Id.*

²⁷ *Harper*, 118 F.4th at 1300 (“At bottom, the district court abused its discretion in admitted the verification letter because the document was hearsay. . . .”)

²⁸ See e.g., *Bagola*, 108 F.4th at 727 (director of enrollment confirmed the certificate’s accuracy); *Rainbow*, 813 F.3d at 1104 (“the enrollment clerk prepared certificates using records maintained in the ordinary course of business”); *Zepeda*, 792 F.3d at 1108, 1115 (enrollment officer confirmed that the certificate confirms the fact of enrollment and blood quantum, and then parties stipulated to admitting it); *United States v. Ramirez*, 537 F.3d 1075, 1082–83 (9th Cir. 2008) (director of membership services explained information reflected on enrollment certificate); *Prentiss*, 273 F.3d at 1282–83 (listing three examples from the 1970s and 1980s of successful presentation of tribal enrollment certificates).

fact, as the Committee reporter acknowledges, “the absence of Indian tribes from the list in Rule 902(1) does not raise a significant problem in practice.” As the cases below demonstrate, parties have been following these procedures, with no issue, for decades.

For instance, in *United States v. Dodge*, the court held that testimony from the superintendent of an Indian entity that the defendant was listed on the roll and that a one-quarter blood quantum was required to be so listed was sufficient to sustain a conviction under § 1153.²⁹ Similarly in *United States v. Lossiah*, a certificate from the tribal enrollment officer explaining that the defendant was enrolled and had three-quarters blood quantum was sufficient to sustain a conviction under § 1153.³⁰ In *United States v. Ramirez*, testimony from the victims that they were enrolled members of a tribe, coupled with their tribal enrollment certificates and testimony from the tribe’s enrollment officer, was sufficient to establish jurisdiction under § 1152.³¹ In *United States v. Rainbow*, testimony from a BIA agent about how enrollment certificates were generated was sufficient to allow admission of the certificates themselves as business records under Rule 803(6).³² And finally, in *United States v. Walker*, the court held that an enrollment certificate issued by the BIA was self-authenticating, and thus supplied sufficient proof of Indian status.³³

This long history shows that the government regularly succeeds in properly introducing evidence of a person’s Indian status in prosecutions under §§ 1152 and 1153. It is only when the government deviates from these procedures that appellate courts will reverse convictions. For instance, when the government presents a certificate in a manner other than as prescribed under FRE 902(11) and also fails to introduce testimony from the appropriate tribal officials, the failure to follow the rules of evidence will sometimes be deemed not harmless and the conviction reversed.³⁴

Amending Rule 902(1) to render tribal enrollment certificates self-authenticating is unnecessary to prevent convictions from being reversed. Complying with existing procedures for authenticating evidence of tribal enrollment is not onerous. Even where the government does not comply with those procedures, the courts of appeals reverse convictions only when there is no *other* admissible evidence that would address the two prongs of the definition of the term “Indian.”³⁵ Most federal prosecutors manage to present enough evidence to insulate convictions under the harmless-error rule. *Harper* and *Wood* appear to represent isolated instances in which the prosecutors may

²⁹ 538 F.2d 770, 786 (8th Cir. 1976).

³⁰ 537 F.2d 1250, 1251 (4th Cir. 1976).

³¹ 537 F.3d 1075, 1082–83 (9th Cir. 2008).

³² 813 F.3d 1097, 1103–05 (8th Cir. 2016).

³³ 85 F.4th 973, 981–82 (10th Cir. 2023).

³⁴ Compare *United States v. Alvarez*, 813 F.3d 1115 (9th Cir. 2016) (conviction reversed), with *United States v. Tsosie*, 709 F. App’x 447, 449 (9th Cir. Sep. 25, 2017) (conviction affirmed because testimony from the defendant’s wife about his Indian status made the evidentiary error harmless).

³⁵ See *Harper*, 118 F.4th at 1301 (finding non-harmless error where the government did not prove an element of the crime “by legal and competent evidence beyond a reasonable doubt”); *Wood*, 109 F.4th at 1266–67 (noting that absence of other information in the record on the defendant’s Indian status meant that the error was not harmless); *Alvarez*, 813 F.3d at 1124 (other properly admitted testimony that did not corroborate the improperly admitted certificate meant that the error in admitting the certificate was not harmless).

not have been familiar with the relevant tribal documents and therefore did not adequately prepare to meet the minimal showing required to establish a defendant's Indian status under the current rules.

V. The government's arguments in favor of the proposed amendment are unpersuasive.

A number of the arguments in favor of the amendment appear to be misinformed. For example, it has been suggested that the BIA has stopped issuing CDIB documents. There is no evidence to support this suggestion. In *Harper*, *Wood*, and *Walker*, these BIA-issued documents were available to the government for use as evidence at trial. In *Walker*, the government presented such a document, and the conviction was affirmed.³⁶ In *Harper*, the court specifically noted that the government opted to prove its case without relying on such a document.³⁷ The BIA continues to issue CDIB documents and appears to intend to continue doing so.³⁸

The government's arguments about the burden and cost of the current Rule appear to assume that the current Rule requires personal appearance in federal court by a tribal official at every trial in which tribal documents are to be introduced. This is not correct. As noted above, tribal documents can be authenticated under Rule 902(11) without testimony by a live witness. It is not clear why obtaining a certification under Rule 902(11) is more burdensome or costly than obtaining a signed and sealed document under Rule 902(1).

The Government's argument that the Transportation Security Administration ("TSA") "does not distinguish among tribes based on the purported reliability of their record systems" is not correct. TSA provides tribes with an opportunity to enter into an agreement with the Department of Homeland Security to produce scannable identifications that meet the requirements of the Western Hemisphere Travel Initiative (WHTI) and that can be used in place of passports at land and sea ports of entry.³⁹ Tribal identifications that do not meet these high standards and that cannot be scanned are in fact treated differently. Specifically, they are "inspected manually and cross-referenced with the Federal Register,"⁴⁰ a process similar to that employed to screen individuals who arrive at the airport with no acceptable identification at all.⁴¹ In other words, TSA does expressly distinguish between tribes and does not treat all tribal

³⁶ See 85 F.4th at 981–82.

³⁷ See 118 F.4th at 1297 (observing that the defendant had a CDIB card but the government chose not present it at trial).

³⁸ See Bureau of Indian Affairs, *Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Request for Certificate of Degree of Indian or Alaska Native Blood*, 89 Fed. Reg. 84927, 84928 (Oct. 24, 2024) ("Currently, the BIA certifies an individual's degree of Indian or Alaska Native blood if the individual can provide sufficient information to prove his or her identity and prove his or her descent from an Indian ancestor(s) listed on historic documents approved by the Secretary of the Interior that include blood degree information.").

³⁹ See, e.g., *Western Hemisphere Travel Initiative: Designation of an Approved Native American Tribal Card Issued by the Kickapoo Traditional Tribe of Texas as an Acceptable Document To Denote Identity and Citizenship for Entry in the United States at Land and Sea Ports of Entry*, 87 FR 37879 (June 24, 2022).

⁴⁰ Transportation and Safety Administration, Tribal and Indigenous, available at <https://www.tsa.gov/travel/tsa-cares/tribal-and-indigenous>

⁴¹ Transportation and Safety Administration, Acceptable Identification at the TSA Checkpoint, available at <https://www.tsa.gov/travel/security-screening/identification>.

identification the same regardless of their demonstrated reliability.

The Government’s analogy to FRCP 6(e)(3), on the other hand, has no clear relevance to the issue under review. FRCP 6(e)(3) allows tribes to receive grand jury information “in order to enforce federal law.”⁴² The role that tribal law enforcement plays in enforcing federal law and the documents tribes might need to perform that task is not obviously related to the question of what rules federal courts should follow when accepting tribal records in evidence, and the government does not explain the connection between the two.

Nor is the government’s analogy to “political subdivisions of remote territories overseas” a good fit given that, as noted above, these subdivisions are subject to public records laws, and their records and recordkeepers are subject to subpoenas. These important tools—nearly completely absent in the context of tribes—give litigants a fair opportunity to test the authenticity and reliability of those materials before trial and to raise appropriate objections in response.

VI. If the amendment is intended to bolster the dignity of Indian tribes, the Advisory Committee should seek input from tribes.

As the Committee Reporter has already acknowledged, the absence of Indian tribes from the list in Rule 902(1) does not raise a significant problem in practice and therefore the issue was one of the “dignity” of Indian tribes. Yet, the Advisory Committee has not sought nor received any feedback from Indian tribes on this proposed amendment. Nor has the Committee heard from judges and attorneys who regularly deal with these evidentiary issues to determine how widespread this problem is. Before amending the rule, the Advisory Committee should solicit feedback from relevant parties.

Regards,

/s/ Ebise Bayisa
Assistant Federal Public Defender
District of Nevada

/s/ Jami Johnson (Choctaw Nation of Oklahoma)
Assistant Federal Public Defender
District of Arizona

⁴² Fed. R. Crim. P. 6, Advisory Committee Notes to the 1999 Amendment.

Hon. Jesse Furman
Chair, Advisory Committee on Evidence Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re. Federal Rule of Evidence 902

Dear Judge Furman:

We are Federal Defenders in federal districts with significant tribal lands. We write to urge the Advisory Committee on Evidence Rules to reject the proposed amendment to Rule 902 of the Federal Rules of Evidence that would add “a document that bears a seal purporting to be that of a federally-recognized Indian tribe” to the list of documents that are self-authenticating.

The proposed amendment is inconsistent with the history and purpose of Rule 902 and is unnecessary to address any problem that exists under the current Rules. The proposal appears to have come largely in reaction to a handful of cases in the Northern and Eastern Districts of Oklahoma handled by prosecutors with little experience with Indian Country cases. These inexperienced prosecutors may have lacked familiarity with relevant statutes and documents, failed to organize their evidence to comply with rules regarding notice and hearsay, or, in some cases, simply failed to understand what they were required to prove under the relevant statutes.

As further described below, few cases appear to have prompted the proposed amendment, but the potential prejudice to defendants is quite large given the sovereign status of tribes, which often poses a significant obstacle to criminal defendants attempting to obtain, investigate, and authenticate tribal records. The Committee should therefore decline to amend Rule 902. But should any amendment occur, the undersigned Federal Defenders urge the change be limited to federally recognized Indian tribes with public records laws that honor requests by non-members.

BACKGROUND

A person’s Indian status triggers federal criminal jurisdiction in two situations. First, 18 U.S.C. § 1153 grants jurisdiction to federal courts over Indians who commit any one of more than a dozen enumerated offenses when those offenses occur in Indian country.¹ In such cases, the defendant’s Indian status is an element of the

¹ In 1953, Congress enacted Public Law 83-280 that granted certain states criminal

crime.² Second, in cases where the defendant is not an Indian, but the crime occurs in Indian country and involves an Indian victim, jurisdiction arises under 18 U.S.C. § 1152, and the victim's Indian status is an element of the crime.³

These two jurisdictional statutes do not define the term “Indian.” But courts generally agree a two-part test determines Indian status: (1) does the individual have a degree of Indian blood; and (2) is he/she recognized as an Indian by the tribe or by the Government.⁴ As with all elements of an offense, the burden falls on the Government to prove beyond a reasonable doubt a defendant's Indian status.⁵

Regarding the first factor—degree of Indian blood—courts hold that, “Indian status is a political classification, not a racial or ethnic one. Indian status requires. . . proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe.”⁶ As to the second factor—recognition by the tribe or by the Government—Indian status requires proving a “link to a federally recognized tribe.”⁷ This link can be shown through proof of “(1) enrollment in a federally recognized tribe; (2) Government recognition formally and informally through receipt of assistance available only to individuals who are members, or eligible to become members, of federally recognized tribes; (3) enjoyment of the benefits of affiliation with a federally recognized tribe; [or] (4) social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe.”⁸

Typically, the Government will establish a person's Indian status in a criminal prosecution by introducing documents reflecting that the person has some degree of Indian blood and is affiliated with a tribe. Regarding blood quantum, the Government may introduce a Certificate of Degree of Indian Blood (“CDIB”) issued by the Bureau of Indian Affairs (“BIA”). The BIA is a federal agency of the

jurisdiction over Indians living on reservations. Subsequent acts of Congress, court decisions, and state actions to retrocede jurisdiction have, over the years, altered the list of states actually exercising such jurisdiction. States that continue to exercise criminal jurisdiction over Indian country are generally not at issue here because in those states Indian criminal jurisdiction cases do not appear in federal court.

² See *United States v. Bagola*, 108 F.4th 722, 726 (8th Cir. 2024). In § 1152 cases, the defendant's status as an Indian is an affirmative defense to the charge. See *United States v. Bruce*, 394 F.3d 1215, 1222–23 (9th Cir. 2005).

³ See *United States v. Reza-Ramos*, 816 F.3d 1110, 1120 (9th Cir. 2016); *United States v. Walker*, 85 F.4th 973, 978 (10th Cir. 2023).

⁴ *United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015) (en banc).

⁵ *United States v. Diaz*, 679 F.3d 1183, 1186 (10th Cir. 2012).

⁶ *United States v. Cooley*, 919 F.3d 1135, 1142 (9th Cir. 2019), *overruled on other grounds*, 593 U.S. 345 (2021).

⁷ *Zepeda*, 792 F.3d at 1114.

⁸ *Id.*

Department of the Interior, and CDIBs “certif[y] that an individual possesses a specified degree of Indian blood of a federally recognized Indian tribe.”⁹ CDIBs are issued by, and bear the seal of, the United States and are already self-authenticating under Rule 902(1).¹⁰

To prove tribal affiliation, prosecutors commonly introduce documents containing evidence of tribal enrollment. “Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative.”¹¹ One common document is a certificate of enrollment, though there is no requirement that tribal enrollment documents be issued in any particular format, and there is wide variation among the tribes regarding what these documents look like. An enrollment certificate introduced to show tribal affiliation may also establish that a person has Indian blood, even absent a CDIB, because blood quantum information is sometimes included on the enrollment certificate.¹²

Unlike CDIBs issued by the BIA, enrollment certificates and other documents issued by Indian tribes are not self-authenticating under Rule 902.¹³ In order to introduce these documents at trial, the Government either must proffer, alongside the tribal certificate, the testimony of a “custodian or other qualified witness” who can explain that the certificate reflects regularly conducted business activity relating to enrollment, or it must furnish a certificate under Rule 902(11) before trial that explains how the document meets the hearsay exception for records of a regularly conducted activity.¹⁴

ARGUMENT

The Advisory Committee should reject the proposed amendment because it is inconsistent with the history and purpose of Rule 902, is unnecessary as there are no

⁹ *United States v. Rainbow*, 813 F.3d 1097, 1103 (8th Cir. 2016); *see also* Bureau of Indian Affairs, *Certificate of Degree of Indian or Alaska Native Blood Instructions*, available at <https://www.bia.gov/online-form/certificate-degree-indian-or-alaska-native-blood-cdib-pdf> (directing applicants to submit their CDIB application to their regional BIA office).

¹⁰ *See United States v. Harper*, 118 F.4th 1288, 1296 (10th Cir. 2024) (citing *Walker*, 85 F.4th at 981–82).

¹¹ *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1977).

¹² *United States v. Alvirez*, 831 F.3d 1115, 1121 (9th Cir. 2016); *see also Bagola*, 108 F.4th at 727 (enrollment certificate reflected blood quantum and tribal affiliation); *Zepeda*, 792 F.3d at 1115 (enrollment certificate reflected blood quantum and tribal affiliation); *but cf. Harper*, 118 F.4th at 1297 (no CDIB or enrollment paperwork introduced).

¹³ *Alvirez*, 831 F.3d at 1123.

¹⁴ *Harper*, 118 F.4th at 1297 (discussing Fed. R. Evid. 803(6) and quoting *United States v. Wood*, 109 F.4th 1253, 1258 (10th Cir. 2024)).

deficiencies in the existing Rules, and does not consider the wide variation among tribes and tribal histories.

I. The proposed amendment is inconsistent with the history and purpose of Rule 902.

A concern in whether any Federal Rule of Evidence should be amended is whether the proposed amendment is consistent with the objectives of Rule. Where, as here, the proposal is to expand an exception to a default rule, the primary consideration should be whether the new class of evidence to be excepted fits within the policy rationale underlying the existing exception. As the Committee is aware, Rule 902 provides a list of narrow exceptions to the general rule that the proponent of a piece of evidence must establish that evidence is what the proponent of the evidence claims it to be. As the Advisory Committee Notes to the Rule clarify, even before becoming codified in Rule 902, the exceptions embodied in the Rule were established through “[c]ase law and statute, over the years, . . . sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension.”¹⁵

Regarding Rule 902(1) and the closely related Rule 902(2), the Rules are clear that the justification for these carefully circumscribed exceptions lies not in concerns about the dignity or sovereignty interests of the enumerated parties, but in concerns about forgery. Rule 902(1) was grounded in a “practical underlying consideration[] . . . that forgery is a crime and detection is fairly easy and certain.”¹⁶ Indeed, Rule 902(2) clarifies that where there could be “greater ease of effecting a forgery,” such as where documents are signed but not sealed, more is required to authenticate the document.¹⁷

In proposing modification by adding “federally[] recognized Indian tribe[s]” to the list of entities whose signed and sealed documents are presumed authentic, the Department of Justice does not mention the Rule’s history. Nor does the Department of Justice try to explain why the nature of tribal documents is such that the “possibility of forgery [is of] a very small dimension” or that detection of a forgery of tribal documents would be “fairly easy and certain.”¹⁸ Indeed, the Department of Justice letter appears to simply presume what the Rules establish, *i.e.*, that documents offered into evidence by a party—including individuals not affiliated with a tribe—that bear a tribal seal and a signature will be a real tribal document and not a fake. While the Department of Justice would assert that the risk of forgery *by the United States* is probably zero, the proposed amendment would apply not just in

¹⁵ Fed. R. Evid. 902, Advisory Committee Notes.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

criminal cases, and not just to documents offered by the United States or to documents offered by the tribes themselves. Tribal documents can also play a role in class action lawsuits,¹⁹ federal family law cases,²⁰ and bankruptcy disputes,²¹ among others.

Technology for creating forgeries has improved substantially since the Rules were first promulgated in 1975. At the same time, the Freedom of Information Act (FOIA), passed in 1967, ensures that anyone doubting the authenticity of an otherwise facially qualifying public record has tools to assuage concerns such that the “possibility of forgery” remains “of a very small dimension.”²² All 50 states have passed laws providing access to public records to members of the public.²³ Puerto Rico,²⁴ the U.S. Virgin Islands,²⁵ American Samoa,²⁶ Guam,²⁷ and the Northern Mariana Islands²⁸ also have public records laws. These laws ensure, consistent with the purpose of the Rule, that the possibility of forgery of official documents of these entities remains a very small dimension and that the detection of forgery would be “fairly easy and certain.”²⁹

Federally recognized Indian tribes are differently situated from the other entities named in Rule 902(1) regarding public records access. Tribal documents are not covered by FOIA.³⁰ And while a few Native American tribes have some form of public records laws,³¹ many do not. In 2001, when the Cherokee Nation passed its Freedom of Information and Rights of Privacy Act, it was the first-ever such act passed by a federally recognized tribe.³²

¹⁹ *Cobell v. Salazar*, 96-cv-1295 (D.D.C.).

²⁰ *E.g.*, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013).

²¹ *E.g.*, *Lac du Flambeau Band of Lake Superior Chippewa Indians, et al. v. Coughlin*, 599 U.S. 382 (2023).

²² Fed. R. Evid. 902, Advisory Committee Notes.

²³ Reporters Committee for Freedom of the Press, *Open Government Guide*, <https://www.rcfp.org/open-government-guide/>.

²⁴ 32 L.P.R.A. § 178.

²⁵ V.I. Code tit. 3, § 881.

²⁶ Am. Samoa Code Ann. tit. 4, § 11.

²⁷ Sunshine Reform Act of 1999, 5 Guam Code §§ 10101 - 10315 (2024).

²⁸ N. Mar. I. Pub. L. 23-24.

²⁹ *Id.*

³⁰ 42 C.F.R. § 137.176.

³¹ *See, e.g.*, Navajo Nation Code Ann., tit. 2, § 81–91; Cherokee Nation Code, tit. 67 §§ 101 et seq.

³² Lindsey Bark, *Cherokee Nation FOIA process allows access for public records*, Oct. 14, 2019, https://www.cherokeephoenix.org/services/cherokee-nation-foia-process-allows-access-for-public-records/article_da650e96-78cd-5ace-ad18-f0432fad0b78.html.

Moreover, the few tribes that have public records laws may restrict access to only citizens of the community. The Cherokee Nation FOIA, for example, permits requests only from “tribal citizens” with proof of enrollment.³³ For large tribes such as the Cherokee, a requirement that requests be made by a citizen may not pose an insurmountable obstacle to access by non-citizens, but a majority of Indian tribes in the United States have fewer than 1,000 members, and the smallest has fewer than 20.³⁴ For these smaller tribes, to the extent that they have public records laws at all, laws making records available only to community members would effectively disable non-members from obtaining access. Further complicating access is that tribal sovereign immunity may place relevant documents beyond the reach of subpoenas by private parties.³⁵

As Federal Defenders, we have serious concerns that the proposal to make tribal public records self-authenticating will further exacerbate the existing information imbalance we frequently see in cases arising under Indian country jurisdiction. Many federal criminal cases in Indian country originate when a case is referred to the federal Government by the tribe. In such cases, tribes are often understandably more likely to cooperate with, and provide information to, the federal Government than they are to defense counsel. When attempting to obtain documents from various tribes as part of our investigations, we regularly are told that the tribe, as a sovereign entity, has no obligation to produce documents to us. We often have to decide whether to ask the prosecution to help us obtain documents—at risk of prejudicial disclosure of pretrial strategy—or simply do without. A rule that allows tribal documents bearing a signature and seal to be accepted as evidence without any additional information about the origin of the document, the circumstances under which it was created, or how or where it has been maintained, would only further exacerbate this existing imbalance.

In sum, considering the very different posture of tribal nations regarding public records access as compared to every other entity identified in Rule 902(1), inclusion of federally recognized tribes on the list of entities whose documents are self-authenticating would undermine the purpose of the exception, introduce unnecessary uncertainty, and risk injection of inauthenticity into what is presently a well-established process.

³³ *Id.*

³⁴ Ricardo Lopez, *How one of America's smallest Indian tribes bounced back from the brink of dying out*, Desert Sun, May 2, 2019, <https://www.desertsun.com/story/news/local/coachella/2019/05/02/how-one-americas-smallest-tribes-survived/3280808002/>.

³⁵ As a matter of law, a federally recognized tribe “is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” *Kiowa Tribe of Okla. v. Mfg. Techs.*, 523 U.S. 751, 754 (1998).

II. The proposed amendment is unnecessary to solve any problem that currently exists under the Rules.

Not only would the proposed amendment upend the policy rationale underlying the Rule, but it would do so for no practical, articulable benefit either to tribes or to litigants. There is no evidence that the current rule is unreasonable, flawed, unworkable, or unduly burdensome.

The April 29, 2025, letter from five Native American judges to the Committee regarding the proposed amendment incorrectly suggests that tribes are currently burdened with travel from remote locations to authenticate documents. This letter overlooks that Rule 902 already provides a way for tribes to authenticate tribal documents without personal appearance. Rule 902(11), which governs certified domestic records of a regularly conducted activity, allows a party to attach a certification by a “custodian or another qualified person” certifying that the record “meets the requirements of Rule 803(6)(A)–(C),” *i.e.*, the “business records exception,” and requires the proponent of the evidence to provide “reasonable written notice of the intent to offer the record [and to] make the record and certification available for inspection.” Under the Rule as presently drafted, a tribe need only provide a certification from an appropriate individual as to the document’s authenticity to avoid providing a live witness.

The requirement that the tribe provide a certification by a custodian or another qualified person presents minimal burden, but provides an important safeguard for criminal defendants who do not have, and often cannot obtain access to, tribal records because it provides defendants with the name of a witness who can be interviewed or, in the rare case in which there remains some genuine question about the authenticity document, can be subpoenaed to testify. No party supporting the proposed amendment has explained why Rule 902(11) is impracticable or unworkable. Neither the letter from the Department of Justice nor the blog posting from the second-year law student that the DOJ letter cites in support of its burden argument mentions Rule 902(11).

Data provided by the Federal Judicial Center (FJC) confirms that the issue identified in the Department of Justice letter: (1) is confined to a very small number of cases, virtually all of which are in the Northern and Eastern districts of Oklahoma; and (2) would not be affected by the proposed amendment. Of the five defendants who the FJC letter identified as having “seriously contested being Indians” in 2023, one—AZ 2:21-cr-355-001—appears to have been erroneously included on the list.³⁶ Of the four remaining cases, three originated in the Northern

³⁶ In that case, the prosecutor argued in a closing statement that “in fact, the defendant for federal purposes without question is an Indian,” and defense counsel objected to the form of the argument on the basis that the jury, and not the prosecutor, is the finder of fact.

and Eastern Districts of Oklahoma, and none of the four involved an authentication issue. Indeed, a tribal custodian testified in each of the four.

Not only was authentication not raised in any of the identified cases, but the admissibility of the document in question would not have been affected by the proposed amendment. In two of the cases—OKE 6:21-cr-333-001 and OKN 4:22-cr-170-001—the defendant objected not that the document proffered was inauthentic but that its use violated some constitutional right or other rule of evidence. In one case—OKE 6:22-cr-76-001—the defendant did not question the authenticity of the evidence but instead questioned the reliability of the historical records from which the document was derived, an argument that would remain available to him even if the Rule were amended in the way proposed. In the last case, SD 5:20-cr-50012-00, the defendant did not question the authenticity of the document but questioned whether, even if taken as true, the contents of the document were sufficient to establish he was an Indian on the offense date.³⁷ Lastly, the two cases in which the FJC identifies defendants as having “litigated whether their alleged victims were Indians” appear to be cases in which the defendant did not stipulate to the victim’s Indian status, and not cases in which there was any “serious contest[]” about the issue.³⁸

The cases relied on by the Government in its letter similarly fail to provide support for amending the Rule. Of the four cases the Government cites supporting the need to reform the Rule, only one—*United States v. Wood*, 109 F.4th 1253 (10th Cir. 2024)—involved a failed attempt to use Rule 902(11) to authenticate tribal documents. And, the issue was not that the documents could not be authenticated under the Rule; it was that the Government simply failed to comply with the notice requirement. *United States v. Harper*, 118 F.4th 1288 (10th Cir. 2024), on the other hand, did not involve Rule 902 at all. There, the tribal custodian, who was also the author of the contested piece of evidence, testified at trial and authenticated the

United States v. Careaga, 2:21-cr-355-001, ECF No. 104, at 40 (D. Ariz. May 12, 2022). Later, in his own closing, defense counsel used his objection to explain to the jury as a general matter—unrelated to any argument about the defendant’s Indian status—that the jury and not the government is the finder of fact. *Id.* at 74. The defendant did not argue that he was not an Indian.

³⁷ In fact, the certificate of Indian blood was admitted without objection in that case. See *United States v. Bagola*, 5:20-cr-50012-KES, ECF No. 227-2, PDF at 106–07 (S.D. Oct. 27, 2022). Furthermore, on appeal the Eighth Circuit determined that the lack of an instruction to the jury about how to determine whether Bagola was an Indian person was not reversible error in large part because of the certificate of Indian blood. *United States v. Bagola*, 108 F.4th 722, 727 (8th Cir. 2024).

³⁸ In OKN 4:22-cr-215-001, the defendant did not stipulate to Indian status but appears to have stipulated to the admissibility of the tribal documents on which the government was relying to prove Indian status, which mooted any authentication challenge.

document. On appeal, the defendant did not raise an authentication challenge. Instead, the defendant's conviction in *Harper* was overturned because the letter on which the Government relied to prove enrollment was hearsay that did not meet the requirements of Rule 803(6).³⁹

While certain recent appellate losses may be frustrating for the Government, no case cited by the Government or identified by the FJC supports an inference that tribal records are unreasonably difficult to authenticate under current rules. Experience shows they are not difficult to authenticate.⁴⁰ There is a long history of federal prosecutors successfully complying with these rules while prosecuting cases under §§ 1152 and 1153. As the Committee reporter acknowledges, the "absence of Indian tribes from the list in Rule 902(1) does not raise a significant problem in practice."⁴¹ As the cases below demonstrate, parties have followed the current procedures for decades without difficulty.

For instance, in *United States v. Dodge*, the court held testimony from the superintendent of an Indian entity that the defendant was listed on the roll, and where one-quarter blood quantum was required to be so listed, was sufficient to sustain a conviction under § 1153.⁴² Similarly in *United States v. Lossiah*, a certificate from the tribal enrollment officer explaining that the defendant was enrolled and had three-quarters blood quantum would sustain a conviction under § 1153.⁴³ In *United States v. Ramirez*, testimony from the victims that they were enrolled members of a tribe, coupled with their tribal enrollment certificates and testimony from the tribe's enrollment officer, was sufficient to establish jurisdiction under § 1152.⁴⁴ In *United States v. Rainbow*, testimony from a BIA agent about how enrollment certificates were generated was sufficient to allow admission of the

³⁹ *Harper*, 118 F.4th at 1300 ("At bottom, the district court abused its discretion in admitting the verification letter because the document was hearsay. . .").

⁴⁰ See e.g., *Bagola*, 108 F.4th at 727 (director of enrollment confirmed the certificate's accuracy); *Rainbow*, 813 F.3d at 1104 ("the enrollment clerk prepared certificates using records maintained in the ordinary course of business"); *Zepeda*, 792 F.3d at 1108, 1115 (enrollment officer confirmed the certificate confirmed enrollment and blood quantum, and parties stipulated to its admission); *United States v. Ramirez*, 537 F.3d 1075, 1082–83 (9th Cir. 2008) (director of membership services explained information reflected on enrollment certificate); *Prentiss*, 273 F.3d at 1282–83 (listing three examples from the 1970s and 1980s of successful presentation of tribal enrollment certificates).

⁴¹ Memorandum from Daniel J. Capra, Reporter, to Advisory Committee on Evidence Rules at 1–2, available at https://www.uscourts.gov/sites/default/files/2024-11_evidence_rules_committee_meeting_agenda_book_final_10-24.pdf.

⁴² 538 F.2d 770, 786 (8th Cir. 1976).

⁴³ 537 F.2d 1250, 1251 (4th Cir. 1976).

⁴⁴ 537 F.3d at 1082–83.

certificates themselves as business records under Rule 803(6).⁴⁵ And finally, in *United States v. Walker*, the court held that an enrollment certificate issued by the BIA was self-authenticating, and thus supplied sufficient proof of Indian status.⁴⁶

This long history shows that the Government regularly succeeds in properly introducing evidence of a person's Indian status under §§ 1152 and 1153. It is only when the Government deviates from these procedures that appellate courts will reverse convictions. For instance, when the Government fails to follow the rules of evidence by presenting a certificate in a manner other than as prescribed under Rule 902(11) or fails to introduce testimony from the appropriate tribal officials, courts may deem such errors not harmless and reverse the conviction.⁴⁷

Amending Rule 902(1) to render tribal enrollment certificates self-authenticating is unnecessary to prevent convictions from being reversed. Complying with existing procedures for authenticating evidence of tribal enrollment is not onerous. Even where the Government does not comply with those procedures, the courts of appeals reverse convictions only when there is no *other* admissible evidence that addressed the two-pronged definition of "Indian."⁴⁸ Most federal prosecutors present sufficient evidence to insulate convictions under the harmless-error rule. *Harper* and *Wood* appear to represent isolated instances in which the prosecutors may not have been familiar with the relevant tribal documents and therefore did not adequately prepare to meet the minimal showing required to establish a defendant's Indian status under the current rules.

III. The proposed amendment ignores the diverse histories of tribal-Government relations.

There are 574 federally recognized Indian tribes in the United States.⁴⁹ Although each tribe has at some point been recognized by the federal Government, not one tribe is a creation of the federal Government. Each one is composed of descendants of

⁴⁵ 813 F.3d 1097, 1103–05 (8th Cir. 2016).

⁴⁶ 85 F.4th 973, 981–82 (10th Cir. 2023).

⁴⁷ Compare *United States v. Alvirez*, 813 F.3d 1115 (9th Cir. 2016) (conviction reversed), with *United States v. Tsosie*, 709 F. App'x 447, 449 (9th Cir. 2017) (conviction affirmed because testimony from the defendant's wife about his Indian status made the evidentiary error harmless).

⁴⁸ See *Harper*, 118 F.4th at 1301 (finding non-harmless error where the government did not prove an element of the crime "by legal and competent evidence beyond a reasonable doubt"); *Wood*, 109 F.4th at 1266–67 (noting that absence of other information in the record on the defendant's Indian status meant the error was not harmless); *Alvirez*, 813 F.3d at 1124 (other properly admitted testimony that did not corroborate the improperly admitted certificate meant the error in admitting the certificate was not harmless).

⁴⁹ See Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 89 Fed. Reg. 99899 (Dec. 11, 2024).

the people who inhabited the territorial lands of the United States for thousands of years before the widespread arrival of European settlers. While tribes share this common history, their particular histories of interaction with the federal Government vary widely, and the term “federally recognized” is, in the context of Rule 902, insufficient to provide adequate direction to courts and litigants about which records qualify as self-authenticating.

To provide one example, the Little Shell Tribe of Chippewa Indians did not gain federal recognition until December 20, 2019.⁵⁰ Undoubtedly, the tribe possesses many records that predate this formal recognition. The proposed amendment provides little assistance to courts or litigants in attempting to determine whether tribal documents created before December 20, 2019, yet bearing appropriate seals and signatures, should be considered self-authenticating under the proposed Rule. More complicated yet, the Ottawa Tribe of Oklahoma’s reservation was created by treaty in 1867, terminated in the 1890s by the Dawes Act, reestablished in 1936 by the Oklahoma Indian Welfare Act, terminated again in 1956 by the Ottawa Termination Act, and finally reestablished again in 1978 by the 1978 Reinstatement Act.⁵¹ It is unclear from the language of the proposed amendment whether documents from each historical period should be treated the same or differently under the Rule.

Without a more nuanced understanding of the universe of tribes and tribal documents potentially affected by the amendment, the amendment risks accidentally introducing uncertainty into a system that is now easily understood by all interested parties.

IV. The proposed amendment fails to appreciate the wide disparity in recordkeeping practices and recordkeeping capacity among tribes.

The proposed amendment also fails to appreciate the diversity in recordkeeping practices among tribes. No doubt some tribes keep excellent records. And some tribes who previously struggled with recordkeeping have made tremendous progress. The Hocak Nation, for example, currently has a high-quality tribal records management program and gives presentations about best practices in tribal records management.⁵² The Hocak Nation was not, however, always a success story. It had

⁵⁰ Kathleen McLaughlin, *A big moment finally comes for the Little Shell: Federal recognition of their tribe.*, Wash. Post (Dec. 21, 2019).

⁵¹ See generally *State v. Brester*, 531 P.3d 125 (Okla. Crim. App. 2023) (discussing the termination and reestablishment of the tribe).

⁵² See Denise Redbird and Bethany Redbird, Hocak Nation Records Managers, *Presentation at the Association of Tribal Archives, Libraries and Museums Annual Conference: Tribal Records Management 102* (Sept. 9–12, 2015), available at <https://www.youtube.com/watch?v=retaN8KDs3M>.

no records management program at all before 1993.⁵³ When the tribe first implemented its records management program, the Hocak record manager had to begin by “sorting through papers/documents in pest-infested basements, storage units and garages all around Wisconsin” with no clear idea of what they might find.⁵⁴ Unfortunately, there are many tribes today still in the same position that the Hocak Nation was in 1993, including tribes that lack funds sufficient to buy filing cabinets.

Among the 574 federally recognized tribes, there are many who have admirable recordkeeping practices. There are many others that fall short of desired completeness, accuracy, and reliability. A rule that affords all public records from all 574 tribes the same presumption of authenticity, with no serious inquiry or investigation into the variety of recordkeeping practices among various groups, risks unfair prejudice to criminal defendants, who have limited legal options for investigating any potential or perceived irregularity in the documents.

V. The Government’s arguments for the proposed amendment are unpersuasive.

Several arguments for the amendment appear to be misinformed. For example, some suggest the BIA has stopped issuing CDIB documents. No evidence supports this suggestion. In *Harper*, *Wood*, and *Walker*, these BIA-issued documents were available to the Government for use as evidence. In *Walker*, the Government presented such a document, and the conviction was affirmed.⁵⁵ In *Harper*, the court specifically noted the Government opted to prove its case without relying on such a document.⁵⁶ The BIA continues to issue CDIB documents to eligible tribal members upon satisfactory proof of eligibility, and apparently intends to continue doing so.⁵⁷

The Government’s arguments about the burdens and costs imposed by the current Rule assume that the current Rule requires personal appearance in federal court by a tribal official at every trial in which tribal documents are introduced. This is not correct. As noted above, tribal documents can be authenticated under Rule

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See* 85 F.4th at 981–82.

⁵⁶ *See* 118 F.4th at 1297 (observing that the defendant had a CDIB card, but the government chose not to present it at trial).

⁵⁷ *See* Bureau of Indian Affairs, *Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Request for Certificate of Degree of Indian or Alaska Native Blood*, 89 Fed. Reg. 84927, 84928 (Oct. 24, 2024) (“Currently, the BIA certifies an individual’s degree of Indian or Alaska Native blood if the individual can provide sufficient information to prove his or her identity and prove his or her descent from an Indian ancestor(s) listed on historic documents approved by the Secretary of the Interior that include blood degree information.”).

902(11) without testimony by a live witness. It is unclear why obtaining a certification under Rule 902(11) is more burdensome or costly than obtaining a signed and sealed document under Rule 902(1).

The Government’s argument that the Transportation Security Administration (“TSA”) “does not distinguish among tribes based on the purported reliability of their record systems” is not correct. TSA provides tribes with an opportunity to contract with the Department of Homeland Security to produce scannable identifications that meet the Western Hemisphere Travel Initiative (WHTI) and can be used in place of passports.⁵⁸ Tribal identifications that do not meet these high standards and that cannot be scanned are treated differently. Specifically, they are “inspected manually and cross-referenced with the Federal Register,”⁵⁹ a process similar to screening individuals who arrive at the airport with no acceptable identification at all.⁶⁰ In other words, the TSA expressly distinguishes between tribes and does not treat all tribal identification the same regardless of their demonstrated reliability.

The Government’s analogy to Federal Rule of Civil Procedure 6(e)(3), on the other hand, does not pertain to the issue under review. Rule 6(e)(3) allows tribes to receive grand jury information “in order to enforce federal law.”⁶¹ The role tribal law enforcement plays in enforcing federal law and the documents tribes might need to perform that task is not obviously related to the question of what rules federal courts should follow when accepting tribal records in evidence. The Government does not explain the connection between the two.

Nor is the Government’s analogy to “political subdivisions of remote territories overseas” a good fit. As noted above, these political subdivisions are subject to public records laws, and their records and recordkeepers are subject to subpoenas. These important tools—nearly absent in tribes—give litigants a fair opportunity to test the authenticity and reliability of those materials before trial and to raise appropriate objections in response.

VI. Any amendment providing self-authentication must be limited to documents issued by federally recognized tribes with public records laws that honor requests by non-members.

⁵⁸ *E.g.* Western Hemisphere Travel Initiative: Designation of an Approved Native American Tribal Card Issued by the Kickapoo Traditional Tribe of Texas as an Acceptable Document To Denote Identity and Citizenship for Entry in the United States at Land and Sea Ports of Entry, 87 Fed. Reg. 37879 (Jun. 24, 2022).

⁵⁹ Transportation and Safety Administration, *Tribal and Indigenous*, available at <https://www.tsa.gov/travel/tsa-cares/tribal-and-indigenous>.

⁶⁰ Transportation and Safety Administration, *Acceptable Identification at the TSA Checkpoint*, available at <https://www.tsa.gov/travel/security-screening/identification>.

⁶¹ Fed. R. Crim. P. 6, Advisory Committee Notes to the 1999 Amendment.

The undersigned Federal Defender urge that the Committee not to adopt the proposed amendment. However, if the Committee is inclined to amend the Rule, the amendment must be limited to documents issued by federally recognized tribes with public records laws that honor requests by non-members. Such a limitation would ensure criminal defendants are not confronted and convicted by evidence they realistically have little meaningful ability to investigate or to challenge.

Sincerely,

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Services of Wisconsin

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MEMORANDUM

TO: Beth Wiggins

FROM: Timothy Lau

DATE: June 24, 2025

RE: Rule 902(1)(A) Study

The Advisory Committee on Evidence Rules is considering a suggestion to add federally-recognized Indian tribes to the list of entities in Rule of Evidence 902(1)(A) that can issue “self-authenticating” “domestic public records.” Because the list currently does not include Indian tribes, a party who seeks to offer a record from a federally-recognized Indian tribe must use another route to authenticate the record. As discussed at the Committee meeting, there is a need for tribal records in federal criminal prosecutions in which federal jurisdiction is dependent on whether the defendant or the alleged victim is “Indian” within the meaning of federal criminal statutes.

The DOJ supports an amendment to Rule 902(1)(A) as a matter of efficiency, arguing that the authentication of such documents is more often contested after *McGirt v. Oklahoma* and that authentication of tribal records requires tribal representatives to travel (sometimes long) distances to qualify the records. The DOJ also asserts that the records of tribes should be self-authenticating in deference to tribal sovereignty.

The Federal Defenders oppose such an amendment, at least without more study, arguing that facts contained in tribal records are elements that the government must prove, and that self-authentication of tribal records is not necessarily in the tribal members’ interest. They also assert that the Indian jurisdictional predicate is frequently stipulated and that the issue of contested authentication of tribal records is localized, so a national solution is unnecessary.

At present, information related to the prevalence of contested tribal documents as well as the tribal views on the issue is lacking.

The Research Division has developed some preliminary information about the prevalence of criminal litigation involving the question of whether the defendant or the victim is Indian (summarized below). In addition to augmenting and fine-tuning this information, the division could also assist in obtaining objective tribal input, both by (1) surveying tribal representatives,

and (2) interviewing the leadership of National Congress of American Indians and other associations. Contact information for all 587 federally recognized tribes is available from the Bureau of Indian Affairs,¹ providing a basis for obtaining a wide range of views from tribes that may have different interests. The survey as well as interviewing national leadership could help identify any unintended consequences of an amendment and nuances that ought to be considered in drafting it.

Preliminary Statistics on Proof of Indian Jurisdictional Predicate in Federal Criminal Trials

In 2023, there were 1,516 criminal defendants terminated by jury trial and 269 defendants terminated by bench trial in the federal courts.

For the 1,516 defendants terminated by jury trial, we preliminarily assessed in two ways whether the charged crimes had as a jurisdictional predicate that the defendant or the victim are Indians. We first electronically searched the jury instructions for the term “Indian.” Second, we searched the fields “ttitle1” through “ttitle5” in the Center’s Integrated Database (IDB) for charges that have as an element whether defendant or victim are Indians. In this search, we looked for these statutes: 18 U.S.C. § 113, §§ 1111-13, §§ 1151-70, and §§ 2241-44; we welcome input on any others that should be included.

These searches identified 80 defendants. This is approximately 5% of all defendants terminated in 2023 by a jury trial. This percentage is a floor, given the limitations of the searches, though perhaps not too much of an undercount.

Of these 80 defendants:

- 67 had the defendant’s being an Indian at issue. The remaining 13 had the victim’s being an Indian at issue.
- Of the 67 defendants whose being an Indian was at issue, 52 stipulated to being Indians, one was ordered conclusively determined an Indian by the court, 3 did not contest being Indians, and 5 seriously contested being Indians. To determine whether the defendant’s being an Indian was seriously contested, we looked to whether an argument was made about the issue in closing or during Rule of Criminal Procedure 29 motion practice. The 5 defendants who seriously contested being Indians are: AZ 2:21-cr-355-001; OKE 6:21-cr-333-001; OKE 6:22-cr-76-001; OKN 4:22-cr-170-001; and SD 5:20-cr-50012-00. No information is available for the remaining 6 defendants.
- Of the 13 defendants whose alleged victim’s being an Indian was at issue, 9 stipulated to the alleged victims being Indians. 2 defendants litigated whether their alleged victims were Indians. These 2 defendants are: OKE 6:20-cr-134-001; and OKN 4:22-cr-215-001. No information is available for the remaining 2 defendants.

¹ Tribal Leaders Directory, Bureau of Indian Affairs, <https://www.bia.gov/service/tribal-leaders-directory>.

For the 269 defendants terminated in 2023 by bench trial, we used the same IDB search method as that used for jury trials. Whether the defendant was an Indian was at issue in only one of the 269 cases. No information could be obtained about that single defendant.

This analysis could be expanded by including defendants terminated in 2024,² which might help determine whether fewer defendants are now willing to stipulate to either themselves or their alleged victims being Indians. Given the relative rarity of criminal litigation raising the question of whether the defendant or the victim are Indians, however, it would be difficult to distinguish between real trends and noise.

Notably, this analysis does not include defendants who pled. Arguably, however, the analysis only needs to examine defendants who are tried because evidence need not be authenticated until trial.³

² It is not useful to investigate data from before 2023. The data from 2020 to 2022 will be subject to pandemic effects, and pre-pandemic data are not useful because *McGirt*, which fundamentally affected criminal jurisdiction involving Indians, was decided during the pandemic. See Roy P. Germano, Timothy T. Lau, & Kristin A. Garri, COVID-19 AND THE U.S. DISTRICT COURTS: AN EMPIRICAL INVESTIGATION (2022).

³ United States v. Patton, No. 2:19-CR-8, 2022 WL 446394, at *1 (W.D. Pa. Feb. 14, 2022). See also United States v. Delgado, No. 1:22-CR-20187-1 (E.D. Mich. Sept. 5, 2023), ECF No. 447, <https://ecf.mied.uscourts.gov/doc1/097113249437> (“[I]ssues of authentication and foundation are best left for trial, especially where . . . authentication will likely involve testimony.”).



the **Chickasaw Nation**

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Bill Anoatubby
Governor

Chris Anoatubby
Lt. Governor

September 5, 2025

Hon. Jessey Furman, Chair
Judicial Conference Advisory Committee on Evidence Rules
VIA EMAIL: RulesCommittee_Secretary@ao.uscourts.gov

Dear Judge Furman and Committee Members:

We appreciate the opportunity to address the Judicial Conference Advisory Committee on Evidence Rules concerning Federal Rules of Evidence (“FRE”) 902(1). The Chickasaw Nation is wholly supportive of the recommended changes to Rule 902(1) as set out in page six of the U.S. Dep’t of Justice’s letter of March 28, 2025. The proposed changes will place federally recognized tribes on the same evidentiary footing as states, territories, and insular possessions. There is no legal or logical reason for requiring the sealed and signed documents of federally recognized tribes to be extrinsically authenticated for admission to federal proceedings when the documents of states, districts, commonwealths, and political subdivisions are not. If adopted, the additional language proposed by the Committee will eliminate this disparity. We are encouraged to see that the Judicial Conference is taking up this very important issue.

I. Background

The Chickasaw Nation is a federally recognized, sovereign and self-governing American Indian tribe operating under a tripartite constitutional government representing its more than 70,000 citizens. The Chickasaw reservation covers 7,648 square miles in all or parts of thirteen counties in what is now the State of Oklahoma. Tribes are independent sovereigns apart from the federal government and state systems. Tribal nations are “distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.”¹ Tribal sovereignty predates and is independent of the U.S. Constitution.² The U.S. Constitution acknowledges the unique status of tribal nations through the “Indian Commerce Clause” that grants Congress the power to regulate commerce with the tribes³ and declares that treaties are “the supreme Law of the Land”⁴—including those made with tribal

¹ *Worcester v. Georgia*, 31 U.S. 515, 519 (1832).

² *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

³ U.S. Const. art. I, § 8, cl. 3.

⁴ U.S. Const. art. VI.

nations.⁵ In other words, tribal nations enjoy sovereignty just as the United States and the states thereof. Thus, federally recognized tribes should also enjoy the same level of trust to prepare, maintain, and produce accurate records to federal courts that our coordinate sovereigns and their political subdivisions do.

Tribes were decreasingly visible to the public in the 20th century. During the Allotment Era, tribal lands were allotted in severalty in an attempt to force assimilation.⁶ The federal recognition of more than 100 tribes was terminated during the 1950s.⁷ It was also during this period that young native adults were forced into cities and native children were disproportionally removed from their homes and placed in non-native foster care.⁸ The effect of the federal government's attempt to force assimilation had devastating effects. Federal policy did not change until President Nixon announced a new era for Tribes in his "Special Message to the Congress on Indian Affairs," ending the era of termination.⁹ The new era of tribal self-determination set the legal foundation for modern tribes including the Indian Self-Determination and Education Assistance Act of 1975¹⁰ and the Indian Health Care Improvement Act of 1976.¹¹

When tribes began to determine their own fates, the quality of life for Indians began to improve. As for the Chickasaw Nation, we purchased the Chickasaw Motor Inn in 1972. Since then, we have consistently built upon each successive commercial enterprise to fund vital programs and services for our citizens, such as education, housing, and health care. The Chickasaw Nation now has a diverse portfolio consisting of government contracting, gaming, venture capital and even a chocolate manufacturing business. According to a recent economic study, the 39 federally recognized tribes in Oklahoma have a \$23.4 billion impact on the state's economy.¹²

While tribal governments' self-sufficiency, self-governance, and financial autonomy has continued to grow, many institutions, including the law, have been slow to adapt to tribes' recent successes in the Self-Determination Era. For example, the Uniform Law Commission ("ULC") has only recently begun recognizing tribal governmental actions.¹³ However, now the ULC usually adds tribes to the definition of "state" in what appears to be an afterthought.¹⁴

⁵ See *McGirt v. Oklahoma*, 591 U.S. 894, 903 (2020),

⁶ E.g., General Allotment Act of 1887 ("Dawes Act"), 24 Stat. 388; the Atoka Agreement as contained in the Curtis Act of 1898, 30 Stat. 495.

⁷ See H.R. Con. Res. 108, 83rd Cong. (1953) (enacted).

⁸ 25 U.S.C. § 1901(4).

⁹ Public Papers of the Presidents of the United States: Richard Nixon, 1970, pp. 564-567, 576-76.

¹⁰ 25 U.S.C. § 5301 et seq.

¹¹ 25 U.S.C. 1601 et seq.

¹² Kyle D. Dean, Ph.D., *The Economic Impact of Tribal Nations in Oklahoma: Fiscal Year 2023*, available at <https://www.unitedforoklahoma.com/wp-content/uploads/2025/06/fiscal-year-2023-tribal-nations-economic-impact.pdf>, last visited June 20, 2025.

¹³ Compare Uniform Law on Notarial Acts (1982) (not contemplating tribal nations) with Revised Uniform Law on Notarial Acts (2010) (now including provision for inclusion of tribal nations).

¹⁴ E.g., Uniform Telehealth Act, § 2(10) (2022).

II. Effect of *McGirt*

Following the Supreme Court's decision in *McGirt v. Oklahoma*, the Chickasaw Nation's reservation was held to be intact in *Bosse v. State*.¹⁵ *Bosse* did not expand Chickasaw tribal criminal court jurisdiction, but recognized the true expanse of "Indian country" was not limited to trust and restricted fee lands. Rather, it envelopes the entirety of the Chickasaw Nation territorial boundaries as defined in the Chickasaw Nation's post-Civil War treaty with the United States. *McGirt*, and *Bosse*, stand for the proposition that there is much more Indian country than the State of Oklahoma previously conceded. The intended result was the settled law of Indian country criminal jurisdiction should be applied to nearly all of eastern Oklahoma, rather than solely trust and restricted land.

Following *Bosse*, the Chickasaw Nation's criminal proceedings rose exponentially—from an average of under 100 per year to 3,100 charges prosecuted 2024. The Chickasaw Nation made swift and substantial investments to enlarge the capacity and capability of its criminal justice system including additions to its court, prosecutor's office, and tribal law enforcement presence. Just this year, the Nation has even created a public defender's office. Concurrently, the number of federal prosecutions (that require proof of Indian Status as an essential element of the crime)¹⁶ also increased after *McGirt* and *Bosse*.

The holdings in *McGirt* and *Bosse* set the table for future conflicts on tribal citizenship. Federal and tribal courts in Oklahoma are handling more cases. The State of Oklahoma has expressed its reluctance to accept most of eastern Oklahoma is Indian country as evidenced by more than forty petitions for certiorari in the 2021-2022 term of the U.S. Supreme Court with the same issue: "Whether *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), should be overruled."¹⁷

United States v. Harper

Federal criminal jurisdiction is set forth in the Major Crimes Act, 18 U.S.C. § 1153, and the General Crimes Act, 18 U.S.C. § 1152. Pursuant to both Acts, Indian status is an element of the offense, requiring proof beyond a reasonable doubt. In *United States v. Harper*, a conviction was reversed because a citizenship letter from the Choctaw Nation was not self-authenticating under Rule 902, and therefore the element of Indian status was not proven.¹⁸

¹⁵ 2021 OK CR 30, 499 P.3d 771 (Okla. Crim. App. 2021).

¹⁶ See *United States v. Rainbow*, 813 F.3d 1097, 1103 (8th Cir. 2016); *United States v. Prentiss*, 273 F.3d 1277, 1280-1281 (10th Cir. 2001).

¹⁷ The National Indian Law Library maintains an extensive list of denied cert petitions: *2021-2022 Term, Supreme Court Cases Related to Indian Law*, <https://www.narf.org/nill/bulletins/sct/2021-2022update.html>, last visited September 3, 2025.

¹⁸ 118 F.4th 1288, 1297 (10th Cir. 2024) ("An Indian tribal certificate, however, is not admissible without authentication.") (internal citations omitted).

Practical Aspects of *Harper*

Since tribal citizenship letters are not self-authenticating, additional extrinsic evidence is required. This is true regardless of the form of the citizenship document. As a result, federal prosecutors must frequently request citizenship documents from tribal governments. Our citizenship office receives approximately 50 citizenship verification requests a month from federal prosecutors. The result of many of those requests is testimony required to be given by our Executive Officer of Self-Governance to appropriately authenticate the citizenship verification documents for introduction in federal criminal proceedings.

While the Chickasaw Nation does not, many tribes rely on the FRE and incorporate the FRE wholesale into their own code. For example, the Muscogee Creek Code states that in the absence of an express Muscogee (Creek) law, the Muscogee (Creek) district courts will use the FRE.¹⁹ As a result, even some tribal courts are requiring the personal appearance of a tribal official to authenticate tribal citizenship documents. This places a great burden on the tribal official, who also has significant responsibilities outside of citizenship verification.

Most tribes are located in rural areas, and the time and expense to make personal appearances for testimony to authenticate citizenship records in multiple federal and tribal courts several times per month is exorbitant and quite frankly, unnecessary. Federally recognized tribes have sophisticated abilities to self-govern and are completely capable of maintaining and producing reliable government documents. Considering that comparable records of even small towns and municipalities are accepted as self-authenticating under Rule 902(1), the continued exclusion of federally recognized tribal governments is at this juncture outdated at least and punitive at most. Fortunately, this issue can be easily remedied as the Committee proposes by adding “federally recognized Indian tribe or Nation” to the list of government entities trusted with producing self-authenticating documents.

III. Comments of the Federal Public Defenders

The Federal Public Defenders commented on the varied history of tribes and the potential disparity in recordkeeping among tribes. This argument is a guise for insinuating that tribal records are not inherently reliable. In terms of history, the Federal Public Defenders cite the Little Shell Tribe of Chippewa Indians (who gained federal recognition in 2019) as comparable to the Chickasaw Nation who had diplomatic relations with European powers prior to the advent of the United States. Each of the federally recognized tribes have their own story and interactions with the United States. Similarly, the stories of states and territories also differ. Are the 20th century territorial records of Hawaii less reliable than the 17th century colonial records of Massachusetts? The fact that tribal governments have different histories, stories, and interactions with the federal government is not a rational basis for questioning the reliability of federally recognized tribes’ government records wholesale.

¹⁹ MCN Code tit. 27, § 2-108.

FRE 902 allows for admission of certain records without an independent authentication. The rule does not state that the veracity of a document cannot be challenged or that historical concerns may not be raised. The Leavenworth County, Kansas courthouse was destroyed by a fire in 1911.²⁰ That is part of Kansas history. However, that fact does not mean that today all of Kansas' government records, or even all of Leavenworth County's government records, are so inherently unreliable as to require independent authentication. So too, the tribes' varying histories and relations with the United States should not be grounds for summarily denying the authenticity of federally recognized tribal government records.

The Federal Public Defenders also raise the issue of differences in recordkeeping among the tribes. Among fifty states, there are fifty different recordkeeping systems—not to mention the plethora of territorial and political subdivisions within those states. Among 574 tribes, there may be 574 different recordkeeping systems and processes. Sovereigns exercising self-governance do not do things in the same way. While the Federal Public Defenders may imply that 574 different recordkeeping systems are too many or too varied, this should not automatically discount the reliability of federally recognized tribal government documents that contain the tribal seal and signature of a tribal official.

There are aspects that make many tribal records *more reliable* than state or municipal records. As to historical documents, many tribal documents are preserved by the National Archives. Federal oversight resulted in many tribal documents being preserved by the Bureau of Indian Affairs ("BIA") or its predecessors. Ledgers, real property instruments, education documents, and others were meticulously preserved by the BIA.

With respect to current documents, many of the most important functions of tribal governments are performed under a self-governance agreement with the United States.²¹ As a result, the federal government is far more involved with tribal government records than with states' records. Federal law creates standards for maintaining records under self-governance agreements.²² The records are available for inspection and audit by the Comptroller General.²³ The programs are required to be audited under the Single Audit Act, similar to a federal grant.²⁴ Failure to abide by these strict standards could result in the federal government reassuming these programs and functions.²⁵ All of this to say that, for tribes' most essential functions, there are federal standards and federal oversight for records management in place that simply do not exist for states outside of grant programs.

Indian tribes have limited criminal jurisdiction over non-Indians. This is not a failure of tribes to address criminal offenses committed by non-Indians in Indian country. The origin of

²⁰ U.S. Dep't of the Interior, Nat'l Park Srv., National Register of Historic Places Registration Form 7, available at <https://npgallery.nps.gov/GetAsset/bbab17b7-471d-46b5-bf44-d7f8c4045b11>.

²¹ 25 U.S.C. § 5301, et seq.

²² 25 U.S.C. § 5305(a).

²³ 25 U.S.C. § 5305(b).

²⁴ 31 U.S.C. § 7501.

²⁵ 25 U.S.C. § 5330.

this limitation rests solely on the United States. The U.S. Supreme Court in *Oliphant v. Suquamish Indian Tribe*²⁶ strictly limited tribal jurisdiction over non-Indians. *Oliphant* was harshly criticized at the time for being ahistorical and dishonest.²⁷ Subsequently, *Duro v. Reina*²⁸ curtailed tribal authority over non-member Indians. *Duro* was promptly overruled by Congress with amendments to the Indian Civil Rights Act, codified at 25 U.S.C. § 1301 et seq.

Tribes, on the other hand, have sought to increase jurisdiction over non-Indians. This is particularly true in areas of vital importance to tribes, like missing and murdered indigenous persons and domestic violence. In a huge political victory, tribes may now prosecute non-Indians for offenses related to domestic violence, child violence and assault on tribal justice personnel under the Violence Against Women Reauthorization Act.²⁹ Tribes generally seek to build upon this restored jurisdiction to protect public safety in Indian country.

The Chickasaw Nation has defined tampering with public records as a criminal offense.³⁰ While generally the Chickasaw Nation criminal code provisions may only be enforced against Indians, this limitation is not self-imposed, as described above. The Chickasaw Nation would robustly enforce its applicable criminal code provisions to protect the authenticity of its records against Indians and non-Indians alike if it were authorized by Congress to do so.

Tribal economic and governmental success has increased the visibility of tribes, also increasing tribal detractors in number and volume. Following *McGirt*, some groups even called for the formal disestablishment of tribes and reservations.³¹ Larger tribes are well aware that every action will be scrutinized, every mistake will be amplified, and any individual mistake or transgression will be attributed to all of Indian country in a way that no state official faces. To imply that a federally recognized tribal government would allow a non-Indian employee to forge documents or otherwise criminally obstruct a federal prosecution with no consequence is disingenuous.

IV. Conclusion

Federally recognized tribal governments are capable of creating, storing, and maintaining accurate tribal records and administering dependable record keeping systems for their governments and citizens that can be relied upon in federal court proceedings. The addition of “federally recognized tribes or Nations” to those governmental entities included in Rule 902(1) would bring consistent application to the admission of records and hopefully prevent further

²⁶ 435 U.S. 191 (1978).

²⁷ See e.g., Nell J. Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 Am. Ind. L. Rev. 109 (1992); Russel L. Barsh, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 Minn. L. Rev. 609 (1979).

²⁸ 495 U.S. 676 (1990).

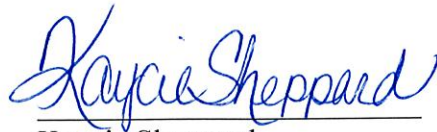
²⁹ 25 U.S.C. § 1304.

³⁰ Chickasaw Nation Code § 17-603.3.

³¹ Okla. Council of Pub. Affs., *OCA urges Congress to provide post-McGirt fairness, certainty and unity*, <https://ocpathink.org/post/press-release/ocpa-urges-congress-to-provide-post-mcgirt-fairness-certainty-and-unity> (Oct. 8, 2020).

anomalous rulings. The Chickasaw Nation is grateful to the Judicial Conference Advisory Committee on Evidence Rules for providing this opportunity to comment on proposed changes to FRE 902(1).

Sincerely,



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/s/ Debra Gee

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NAVAJO NATION DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

COLIN W. BRADLEY
Acting Attorney General

KATHERINE C. BELZOWSKI
Delegated Deputy Attorney General

September 5, 2025

Hon. Jesse Furman
Chair, Advisory Committee on the Rules of Evidence
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Federal Rule of Evidence 902

Dear Judge Furman,

The Acting Attorney General of the Navajo Nation submits this letter on behalf of the Navajo Nation Department of Justice in support of amending Federal Rule of Evidence 902(1) to add federally recognized Indian tribes to the list of governmental entities that can provide signed and sealed documents for self-authentication. The Navajo Nation Department of Justice is the statutorily prescribed legal counsel for all three branches of the Navajo Nation government. The Navajo Nation Department of Justice has a direct interest in this amendment because it regularly represents the Navajo Nation in federal court and, as the tribe with the largest land base in the United States, many criminal cases arise on the Navajo Nation that are subject to federal prosecution.

The Navajo Nation is a sovereign government with ratified treaties with the United States from 1849 and 1868. The Navajo Nation has more than 400,000 citizens, and its territory extends across Arizona, New Mexico, and Utah, encompassing over 27,000 square miles. While population, land base and governmental structure vary among tribes, each possesses undisputed sovereign authority over their members and territories. *Oklahoma Tax Com'n v. Citizen Bank Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). As sovereigns, tribes determine their own governmental organization and internal legal systems. Tribes maintain the inherent authority to regulate activities within their tribal territory to govern all areas of sovereign interest. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978) (discussing the power to govern internal matters).

Because the Navajo Nation, and other tribes, are sovereign governments that regulate their own affairs, they should be empowered to provide signed and sealed documents for self-authentication. The amendment to the Federal Rules of Evidence that eliminates administrative burden while putting the Navajo Nation on equal footing with other governments is a welcome change.

Sincerely,

Colin Bradley,
Acting Attorney General

QUAPAW NATION

P.O. Box 765
Quapaw, OK 74363-0765

(918) 542-1853
FAX (918) 542-4694

August 28, 2025

VIA E-MAIL AND FIRST CLASS MAIL

Indian Health Service
Steven Boyd, Project Engineer
OEH&E Field Office
P.O. Box 510
Miami, OK 74354

Hon. Jesse M. Furman
Chair, Advisory Committee on the Rules of Evidence
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

RE: Proposed Amendment to Federal Rule of Evidence 902

Dear Judge Furman:

We are submitting this letter in support of the Proposed Amendment on behalf of the Quapaw Nation of Oklahoma ("Nation"), a federally recognized and sovereign Tribal Nation. The Quapaw Nation Business Committee ("Business Committee") is the duly elected leadership delegated with the governing authority to speak and act on behalf of the Quapaw Nation in all matters.

We have received the May 23, 2025 "Dear Tribal Leader" letter from the Honorable Chairman Furman on behalf of the Judiciary Conference Advisory Committee on Evidence Rules (the "Committee") and understand that on or after your stated deadline of September 5, 2025, the Committee will consider an amendment to Rule 902(l) of the Federal Rules of Evidence ("Rules") to add federally recognized tribes to the list of entities from which a sealed and signed document would be self-authenticating if offered as evidence in federal court ("Proposed Amendment").

The Business Committee strongly supports the Proposed Amendment because it better recognizes, respects, and upholds the principles of tribal sovereignty than the currently enacted Rule 902, which, inequitably, concedes as self-authenticating the sealed and signed documents of all government entities except tribal nations. We are informed that the apprehensions expressed for tribal nation inclusivity run the gamut of expressed fears from the apprehension that such amendment would landslide into the necessity for far more comprehensive legislative reforms, to long-standing misconceptions and implicit biases about the professionalism of tribal nations and the details of their administrative operations, e.g., recordkeeping, and even, as redressed here, the lack of tribal nation engagement during any attempt to modify the Rules.

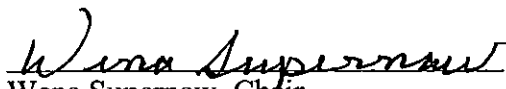
Whatever the suggested justifications to exclude tribal nations from uniform consideration under the original iteration of this Rule, the Business Committee applauds the Proposed Amendment as an opportunity to correct an obvious wrong with a straightforward fix. To that end, we take issue with the argument that the Proposed Amendment should be rejected because it might necessitate further, consequential reforms. While the Proposed Amendment may lead to other legislative improvements, this is a positive and natural evolution of a healthy legal framework that may just indicate that the system was in greater need of repair. Moreover, this argument misses the point which is that the current Rule 902(l) fails to recognize the legitimacy of tribal documents in federal cases and, in so doing, treats tribal nations differently and less than all other sovereigns, even municipalities, under the same Rules. This is the discriminatory problem that still needs to be solved and is serious enough of itself to warrant change. The need for immediate reform should not be stalled indefinitely simply by the prospect of future work and hypothetical future difficulties; a maneuver that has relegated the Proposed Amendment to institutional inertia since at least 2013.

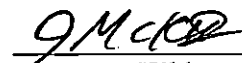
The Quapaw Nation agrees with the Committee that *McGirt v. Oklahoma*, 591 U.S. 894 (2020), presents an exceptional and justifiable basis for revisiting the Proposed Amendment, given the unprecedented jurisdictional shifts and legal uncertainties confronting Oklahoma tribal nations as a direct result of this decision. Despite a history of inadequate funding and other systemic challenges, tribal nations are proactively expanding their law enforcement, judicial, and prosecutorial capacity to meet massive surges in caseloads and provide robust justice services for their communities. The call to eliminate outdated and complex federal evidentiary requirements is stronger than ever. Beginning with the Proposed Amendment, we must act immediately to reduce the unfair burden on both tribal nations and federal prosecutors, thereby promoting justice and supporting continued growth in the jurisdictional landscape after *McGirt*.

We look forward to further discussion of these issues should the Committee advance the Proposed Amendment for formal government-to-government consultation.

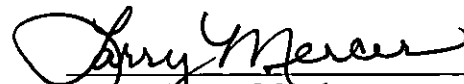
Respectfully,

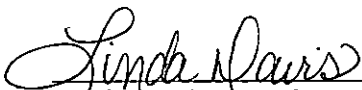
Quapaw Nation Business Committee:

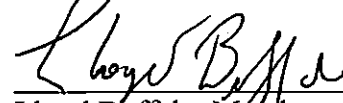

Wena Supernaw, Chair

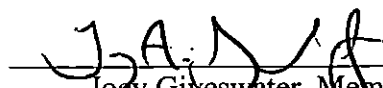

Manz McKibben, Vice-Chair


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September 5, 2025

Submitted via RulesCommittee_Secretary@ao.uscourts.gov

Honorable Jesse M. Furman
Chair, Advisory Committee on Evidence Rules
Committee on Rules of Practice and Procedure of the Judicial Conference of the United States
Administrative Office of the U.S. Courts
One Columbus Circle NE
Washington, D.C. 20544

Re: Proposed Amendments to Federal Rules of Evidence

Dear Judge Furman:

I write on behalf of the Northern Plains Indian Law Center to provide comment on the proposed revisions to the Federal Rules of Evidence. We recommend that federally recognized Indian Tribes be added to the list of governments whose sealed and signed documents are considered “Domestic Public Documents” under Rule 902(1)(A).

At present, Indian Tribes are *the only* sovereign entities whose documents are not considered under Rule 902. While this may have been an oversight when Rule 902 was drafted, it is no longer excusable and must be remedied.

I. Indian Tribes are Imbued with Inherent Sovereignty.

Indian tribes are “distinct, independent, political communities, retaining their original natural rights.” *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832) (Marshall, C.J.).¹ Tribes possess inherent

¹ See also *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (explaining tribes “remain ‘separate sovereigns pre-existing the Constitution’”) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (describing “tribe’s general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction”); *United States v. Kagama*, 118 U.S. 375, 381 (1886) (describing tribes as “having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations”). “Tribal sovereignty does not derive from the United States. Federal law acknowledges that tribal powers stem, not from acts of Congress, but are inherent sovereign powers that have never been extinguished. This sovereignty predates the formation of the United States and persists unless diminished by federal law.” Cohen’s Handbook of Federal Indian Law § 1.01 (2024).

governmental authority, including the authority to criminalize conduct,² levy taxes,³ and adjudicate disputes,⁴ and they possess sovereign immunity.⁵ This inherent power makes them similarly situated with other governmental entities currently listed in Rule 902. And yet, while Rule 902 recognizes as self-authenticating documents provided by domestic sovereigns,⁶ foreign sovereigns,⁷ and even non-sovereign domestic governments,⁸ Rule 902 provides no avenue for self-authentication of sovereign Indian Tribes' documents.

II. Respect for Indian Tribes as Sovereigns Outweighs the Narrow Concerns of the U.S. Department of Justice and the Federal Public Defenders.

The United States Department of Justice urges the amendment of Rule 902(1) to include federally recognized Indian Tribes,⁹ and the Federal Public Defenders opposed such an amendment.¹⁰ We offer no opinion on the specific question of the use of Indian Tribes' documents

² *United States v. Wheeler*, 435 U.S. 313, 328 (1978) (discussing criminal prosecution and explaining “when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty”); *Talton v. Mayes*, 163 U.S. 376, 380 (1896) (explaining Tribe had “power to make laws defining offenses and providing for the trial and punishment of those who violate them when the offenses are committed by one member of the tribe against another one of its members within the territory of the Nation”).

³ *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980) (“The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.”).

⁴ See *Williams v. Lee*, 358 U.S. 217, 223 (1959) (“The cases in this Court have consistently guarded the authority of Indian governments over their reservations.”).

⁵ *Bay Mills Indian Community*, 572 U.S. at 788 (“Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the ‘common-law immunity from suit traditionally enjoyed by sovereign powers.’”) (quoting *Santa Clara Pueblo*, 436 U.S. at 58).

⁶ Fed. R. Evid. 902(1)(A) (self-authentication of sealed-and-signed documents of “the United States” and of “any state . . . of the United States”).

⁷ Fed. R. Evid. 902(3) (self-authentication of “Foreign Public Documents”).

⁸ Fed. R. Evid. 902(1)(A) (self-authentication of sealed-and-signed documents of “any . . . district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above”). As sovereigns, tribes are imbued with greater authority than cities, counties, or towns, which exercise only the authority delegated by states. See *Wheeler*, 435 U.S. at 318 (describing “dual sovereignty” and distinguishing tribes from cities); *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 71 (2016) (“a municipality cannot qualify as a sovereign distinct from a State”); *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) (“Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities.”).

⁹ Letter from Elizabeth J. Shapiro, U.S. Department of Justice, to Hon. Jesse Furman, Chair, Advisory Committee on the Rules of Evidence (Mar. 28, 2025).

¹⁰ Letter from Ebise Bayisa & Jami Johnson, Assistant Federal Public Defenders, to Hon. Jesse Furman, Chair, Advisory Committee on the Rules of Evidence (Apr. 3, 2025) (hereinafter, “Federal Public Defenders Letter”).

in federal criminal prosecutions.¹¹ Rather, our concern is that Indian Tribes are *the only* sovereigns whose documents cannot be self-authenticated under the Rule 902.

Although Indian Tribes are “domestic” sovereigns of a sort,¹² they are not presently included within the ambit of Rule 902(1). That rule lists which governments are “domestic” for its purposes—namely, the United States, the States, and their subordinate entities.¹³ Not only are Indian Tribes not listed in Rule 902(1)(A), their sovereignty is wholly distinct from those entities that are listed in the Rule.¹⁴ Between the omission of Indian Tribes from the list of governments in the Rule, and the distinct nature of Indian Tribal sovereignty, Indian Tribes do not presently fit within Rule 902(1)’s ambit.

Nor do Tribes qualify as “foreign countr[ies]” under Rule 902(3). Unlike, Rule 902(1), Rule 902(3) does not provide a comprehensive list of those governments whose documents qualify for self-authentication. However, American law has long distinguished Indian Tribal sovereigns from “foreign” sovereigns.¹⁵ Moreover, context clues—specifically, references to U.S. State Department officials¹⁶—suggest that Indian Tribes were not among the sovereigns to be encompassed by Rule 902(3). Although Indian Tribes’ sovereignty is “extraconstitutional,”¹⁷ Indian Tribes are not “foreign countr[ies]” whose documents may be self-authenticating under Rule 902(3).

The omission of Indian Tribes cannot be justified by the “diverse histories” and “wide disparity in recordkeeping practices and recordkeeping capacity among tribes,” as suggested by the Federal Public Defenders.¹⁸ Rule 902(1) allows for the self-authentication of documents not only of the sovereign State of Nebraska and of its largest municipality, Omaha, but also of Monowi, Nebraska, “the only incorporated place in the US with just one resident.”¹⁹ Rule 902(3) allows for self-authentication of documents not only from stable nations such as Canada, but also from nations

¹¹ We observe, however, that on this very day the U.S. Circuit Court of Appeals for the Tenth Circuit handed down an opinion vacating an Indian country conviction because the evidence of Indian status was improperly admitted. *United States v. Harley*, No. 23-7046 (10th Cir. Sept. 5, 2025, slip op.).

¹² Chief Justice Marshall described Indian Tribes as “domestic dependent nations.” *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19 (1831).

¹³ Fed. R. Evid. 902(1)(A).

¹⁴ *Wheeler*, 435 U.S. at 318; *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (“the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution”).

¹⁵ *Cherokee Nation*, 30 U.S. at 16-18 (distinguishing “Indian tribes” from “foreign states” and “foreign nations”).

¹⁶ Fed. R. Evid. 902(3) (“The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.”).

¹⁷ *United States v. Lara*, 541 U.S. 193, 213 (2004) (Kennedy, J., concurring).

¹⁸ Federal Public Defenders Letter at 5-6. The Federal Public Defenders’ assertion that there are “tribes that lack funds sufficient to buy filing cabinets” is unsupported by any evidence or citation, and should be disregarded by this Committee.

¹⁹ Will Francome et al., *Welcome to Monowi, Nebraska: Population 1*, BBC (May 2, 2020), <https://www.bbc.com/travel/article/20180129-welcome-to-monowi-nebraska-population-1>. That resident, 84-year-old Elise Eiler, explains that, as secretary of the village, she approves her own liquor license. *Id.*

such as Somalia, Yemen, and South Sudan that frequently are described as failed states.²⁰ If the Federal Rules of Evidence can provide for the self-authentication of documents from Morrow, Nebraska, and from South Sudan, then surely they can provide for the self-authentication of documents generated by Indian Tribes.

III. Two States Already have Recognized Indian Tribes as Governments whose Sealed-and-Signed Documents are Self-Authenticating.

Should Rule 902(1) be amended to include federally recognized Indian Tribes, the Federal Courts would not be the first judicial institutions to do so. New Mexico was the first; by Supreme Court Order 12-8300-015 (2012), it add “Federally Recognized American Indian Tribe or Nation” to the list of domestic governments whose sealed-and-signed documents are self-authenticating.²¹ Arizona, using the same language as New Mexico, followed suit in 2023, by Supreme Court Order No. R-23-0015.²² A similar rule has been proposed in Alaska.

IV. Amending Rule 902(1) Would Not Affect Any Other Rule.

The Federal Courts previously considered amending Rule 902(1) more than a decade ago, at the recommendation of the Hon. Andrew D. Hurwitz (9th Cir.). At that time, “the Committee concluded that it should not proceed . . . because the treatment of Indian tribal documents raises questions that potentially impact rules other than the Evidence Rules” and “the Committee should await the direction of the Standing Committee concerning whether this is an issue for the Committee or for more than one advisory committee to consider.”²³ Earlier this year, the Amicus Subcommittee of the Advisory Committee on the Federal Rules of Appellate Procedure gave a similar explanation when it declined to include Indian Tribes among those governments exempted from certain amicus brief requirements.²⁴ This objection is not persuasive.

First, there is no reason to think that an appropriate amendment to Rule 902(1)(A) would affect any other of the Federal Rules of Evidence—much less any other Federal Rules. Second, more than a decade after a proposed amendment to Rule 902(1)(A) was first proposed, the “direction” that this Committee looked for has not come; and as the most recent comment of the Amicus Subcommittee demonstrates, there has been no comprehensive review of how Indian Tribes should be treated across the Federal Rules. Rule 902(1)(A) *can* be amended to include federally recognized Indian Tribes without affecting any other Federal Rule. And Rule 902(1)(A) *should* be amended to

²⁰ World Population Review, *Failed States 2025*, <https://worldpopulationreview.com/country-rankings/failed-states>.

²¹ N.M. R. Evid. 902(1)(a).

²² Ariz. R. Evid. 902(1)(A).

²³ Report of the Advisory Committee on Evidence Rules, May 7, 2013, at 5, *available at* https://www.uscourts.gov/sites/default/files/fr_import/EV05-2013.pdf.

²⁴ Memorandum from Amicus Subcommittee to Advisory Committee on the Federal Rules of Appellate Procedure 8 (Mar. 7, 2025) (“Native American organizations suggest adding tribes to the list of government entities that can file amicus briefs without a motion. . . . [T]he issue of the treatment of tribes arises under a number of rules, including a possible new rule governing intervention on appeal, and the subcommittee recommends treating this issue in a unified rather than piecemeal way.”), *available at* <https://www.uscourts.gov/sites/default/files/2025-04/2025-04-appellate-rules-committee-agenda-book-final-revised-4-1-25.pdf> at 189, 196.

afford federally recognized Indian Tribes the respect they are due.

For the aforementioned reasons, we respectfully request Rule 902(1)(A) be revised to include federally recognized Indian Tribes among the governments whose sealed-and-signed documents constitute self-authenticating evidence in the Federal Courts.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dan Lewerenz", with a stylized flourish at the end.

Dan Lewerenz, Assistant Professor of Law
Northern Plains Indian Law Center
University of North Dakota School of Law

TAB VI

FORDHAM

University School of Law

Lincoln Center, 150 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 973-975-5298
e-mail: dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra
Re: Possible Changes to the State of Mind Exception, Rule 803(3)
Date: October 1, 2025

Rule 803(3) provides a hearsay exception that allows a declarant's statement of a then-existing state of mind to be admitted to prove that the declarant actually had that state of mind. For example, assume that a declarant's domicile is in dispute. The proponent offers a hearsay statement from the declarant: "I plan to stay here." That is an expression of a then-existing state of mind, and it is offered for its truth, i.e., that the declarant had that state of mind. Rule 803(3) provides that the statement is admissible over a hearsay exception.

The original Advisory Committee justified the exception as a "specialized application" of the present sense impression exception, Rule 803(1). The Committee Note states, opaquely, that the state of mind exception is "presented separately to enhance its usefulness and accessibility." The analogy to Rule 803(1) seems sound at first glance. A present sense impression involves the declarant describing some external event that is perceived at the time of the statement. The guarantee of reliability is immediacy. A state of mind statement is the declarant describing an internal event perceived at the time of the statement, so presumably there is immediacy.

Unfortunately, that analogy doesn't really work. With a present sense impression, one can actually determine when the event occurred, and thus can measure the time between the event and the statement. With a state of mind statement, the "event" is completely internal, and you are relying on the declarant's own statement that she actually has the described feeling at that time. Assume a driver is stopped by the police and a search uncovers drugs in a secret compartment. The driver says "I feel so innocent right now." That statement fits within the terms of the state of mind exception. But there is no way to determine whether that is a contemporaneous statement of the driver's state of mind.

Another stated argument supporting the state of mind exception is that the declarant has unique perception into his own state of mind.¹ That is considered important because the risk of the declarant's misperception is one of the reasons that hearsay is presumptively excluded. But the flaw in the premise is that uniqueness does not mean accuracy. A person's own perception of their mental state may well be flawed --- that's what we have therapists for.

Because the state of mind exception is somewhat shaky in its foundations, and also because every statement ever made reflects the declarant's state of mind in some respect, it is probably predictable that the courts have differed in their approach to the exception. There are two Circuit splits that have developed.

This memo is in three parts. Part One discusses the circuit split over whether a spontaneity requirement, or some other trustworthiness guarantee, is a part of --- or should be added to --- the rule. Part Two discusses the circuit split over whether the state of mind exception covers statements made by the declarant about *another person's* state of mind or conduct. Part Three sets forth some possible ways to amend the rule.

It must be noted that no vote will be taken on any proposed amendment to Rule 803(3) at this meeting. The question for the Committee is to determine whether further consideration of a possible amendment should occur at the next meeting, or whether the matter should be tabled.

I. Adding a Spontaneity or Other Trustworthiness Requirement to Rule 803(3)

A circuit split has developed over whether the rule should be read to contain a spontaneity requirement, to help ensure that the statement is not fabricated and self-serving. Many courts believe that, to be admissible under Rule 803(3), the statement must appear to be spontaneous when made, rather than planned out.

On its face, Rule 803(3) does not contain a specific "spontaneity" requirement. That was pointed up by the court in *United States v. Lawal*, 736 F.2d 5 (2d Cir. 1984), a case in which the defendant arrived at Customs after a flight from Nigeria, and drugs were found in his luggage. When the drugs were found, Lawal made a statement of anger at being "set up" and duped by a person in Nigeria. Essentially, he expressed an innocent state of mind. At trial, the defendant offered this statement to prove that he had no intent to smuggle drugs.² The trial court excluded the statement on the ground that it appeared to be planned and thus it was unreliable. But the court of appeals held that this was error. It observed that the statement expressed the declarant's *then-existing* state of mind, and this is all that the rule requires. The court concluded that statements that fit the definition of Rule 803(3) cannot be excluded as hearsay, even if they are self-serving and made under untrustworthy circumstances; the rule does not give the courts

¹ See Liesa L. Richter, *Goldilocks and the Rule 803 Hearsay Exceptions*, 59 Wm & Mary L.Rev. 897, 941 (2018) ("The rationale underlying the state of mind exception is that there is no better evidence of a person's own mental condition than that person's own contemporaneous description.").

² Note that Lawal could not offer the hearsay as a party-opponent statement under Rule 801(d)(A) because a party cannot offer their own statements under that exception.

discretion to exclude untrustworthy statements. The court concluded that under Rule 803(3), the potential untrustworthiness of a statement of the declarant's existing state of mind affects the weight and not the admissibility of the statement.³ The Fourth Circuit appears to be of the same mind, rejecting a lower court's ruling excluding a state of mind statement because it looked fabricated. See *United States v. Gallagher*, 90 F.4th 182, 196 (4th Cir. 2024) ("No precedential opinion of this Court announces such a requirement, which appears nowhere in the text of Rule 803(3) or the advisory committee notes. Indeed, a leading treatise notes that '[t]he federal courts are in some conflict over' whether Rule 803(3) authorizes a court 'to exclude statements based on questionable motivation[s] of the declarant' or whether such matters go instead 'only to the weight to be given to the statement by the jury.' 2 McCormick § 274 n.8.").

But most courts have engrafted some kind of spontaneity requirement to the rule. Most of the cases are like *Lawal*, involving self-serving statements made by criminal defendants. Essentially the courts are amending the rule by judicial opinion.⁴ Here are some of the cases in which courts have excluded statements of innocence offered under the state of mind exception:

- *United States v. Cianci*, 378 F.3d 71, 106 (1st Cir. 2004) ("a declaration, among other things, must mirror a state of mind, which, in light of all the circumstances, including proximity in time, is reasonably likely to have been the same condition existing at the material time"; the court must focus on whether statements are "self-serving attempts to cover tracks already made. Such observations are well-established grounds for non-admission [under 803(3)].").

- *United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001) (holding a statement inadmissible under Rule 803(3) because the "remarks were more self-serving than they were candid");

- *Acevedo v. City of Reading*, No. CV 23-1224-KSM, 2024 WL 4340720, at *13 (E.D. Pa. Sept. 27, 2024) ("In making the foundational inquiry on admissibility under [Rule 803(3)], the court must evaluate three factors: contemporaneity, chance for reflection, and relevance.").

- *United States v. Singh*, 147 F.4th 652 (6th Cir. 2025) (the court examines whether the defendant had the "opportunity to reflect and possibly fabricate or misrepresent her thoughts" and whether the statements were "about a belief she held at the moment" when the statements were made).

- *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986) ("the statements must be contemporaneous with the . . . event sought to be proven [and] it must be shown that the declarant had no chance to reflect—that is, no time to fabricate or to misrepresent his thoughts").

³ See also *United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984) (Friendly, J.) (exculpatory statement of state of mind made under possibly untrustworthy circumstances is admissible under Rule 803(3): "False it may well have been but if it fell within Rule 803(3), as it clearly did if the words of that rule are read to mean what they say, its truth or falsity is for the jury to determine.").

⁴ The Supreme Court has held that the Federal Rules of Evidence are to be applied by their plain meaning; if it is in the text, apply it, but don't add anything. See 505 U.S. 317 (1992) (Second Circuit was in error in applying a hearsay exception as guaranteeing fairness, when "fairness" was not in the text).

- *United States v. Dierks*, 978 F.3d 585 (8th Cir. 2020) (to “negate the likelihood of deliberate or conscious misrepresentation . . . we exclude evidence if the defendant had time to reflect on his situation before making the statement”).

- *Wilson v. City of Los Angeles*, No. CV 18-5775-KS, 2020 WL 7711836, at *9 (C.D. Cal. July 20, 2020) (Ninth Circuit courts “must evaluate three factors: contemporaneousness, chance for reflection, and relevance. . . . [and] [t]he more time that elapses between the period about which the declarant is commenting and the declaration, the less reliable the statement because there is a greater opportunity for mistake and misrepresentation.”).

- *Pueblo of Jemez v. United States*, 430 F. Supp. 3d 943 (D.N.M. 2019) (the statement must relate to “the declarant’s state of mind *during* the incident in question” and “it must also be established that there was no opportunity for the declarant to fabricate or to misrepresent his thoughts.”).

It should be noted that the courts that vary from the Rule’s text do not follow a uniform approach. Some look for contemporaneity between the event described by the declarant and the statement. Some look for whether the statements are self-serving. The goal for all these approaches is probably captured by the term “spontaneous.” If it is spontaneous, it means that there was no time or opportunity for reflection or self-promotion.

While trustworthiness may be a part of the *rationale* for Rule 803(3), the rule *as written* does not contain a provision for excluding untrustworthy statements that would otherwise fall within the hearsay exception—in contrast to some other hearsay exceptions such as Rule 803(6), which contain specific language excluding untrustworthy statements. All that is required under Rule 803(3) is that the statement must be of a “then existing” state of mind --- that is not about the time between the event and the statement, but rather whether the declarant is describing his state of mind as it exists at the time of the statement. And the defendant’s statement in a case like *Lawal* clearly meets this requirement --- he is saying, “I feel innocent right now.” Courts are not allowed, outside the rulemaking process, to impose textual limitations on hearsay exceptions. Finally, the self-serving nature of a criminal defendant’s expression of an innocent state of mind such as that in *Lawal* is subject to a clear attack as to weight. The reason for the hearsay rule is that jurors ordinarily can’t weigh hearsay properly --- they don’t know when hearsay is unreliable. But when it comes to self-serving statements of criminal defendants, the Advisory Committee assumed that any lack of sincerity could easily be understood by the jury. So there seems little need for the trial judge to exclude the statement on trustworthiness grounds when to do so is contrary to the language of Rule 803(3).

The split in the courts on the spontaneity factor is longstanding and unlikely to be resolved by the Supreme Court. Indeed, in 2005, the Supreme Court denied certiorari in a case raising the issue whether Rule 803(3) authorizes the trial judge to exclude state-of-mind statements that are doubtful or insincere.⁵ Moreover, it seems to arise fairly often in the reported cases --- which is probably unsurprising given that the issue ordinarily arises with exculpatory statements offered by a criminal defendant. The cases cited above are mostly from the last two years, and there were plenty before them that these cases are relying upon.

⁵ *Cianci v. United States*, 546 U.S. 935 (2005) (denying petition raising circuit split on Rule 803(3)).

Assuming that the Committee believes that the split is one worth rectifying, the textual solution raises some difficulties. First, let's assume that the Committee favors the Second Circuit view. While that view is a correct construction of the text, *there would have to be an amendment to change all the case law that reads a spontaneity requirement into the rule when it is not actually there. The rule might look like this:*

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health); -- whether or not spontaneous --- but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

One could argue that it would be odd to amend a rule to say "the rule means what it has always said." But sometimes such an amendment is necessary. That was exactly the problem addressed with the 2023 amendment to Rule 702. The amendment made more specific what it had always provided. So it would not be unheard of to amend the rule to correct the misinterpretations of courts, if the Committee decides that the rule does not need further trustworthiness requirements.

In contrast, let's assume that the Committee wishes to add a spontaneity requirement. There are some drawbacks to that approach. Most importantly, if Rule 803(3) precludes the defense from admitting a defendant's nonspontaneous (and potentially calculated) statement of innocence, that exclusion puts pressure on the defendant to forego her privilege and testify. A rule with such important consequences needs to be thought about twice. Moreover, there is a risk that courts will overregulate and exclude statements that the jury can easily handle.

If, however, the Committee believes that the current rule does not provide an adequate guarantee of trustworthiness, there are two possible fixes. One fix would be to add an explicit spontaneity requirement to the rule. The amended rule could admit the following state-of-mind statements:

A spontaneous statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)

A second possibility would follow the proposal made by Professor Richter, in her famous article on the hearsay exceptions: Liesa L. Richter, *Goldilocks and the Rule 803(3) Exceptions*, 59 Wm. & Mary L.Rev. 897 (2018). Professor Richter argues that the best way to fix any of the dubious Rule 803 exceptions (including Rule 803(3)), is to follow the approach of Rule 803(6) and (8). These rules set out admissibility requirements, and then add a trustworthiness safety valve---allowing for exclusion if the opponent can show that the statement is untrustworthy under the circumstances. Adding a trustworthiness requirement to Rule 803(3) would look like this:

A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily

health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will. The evidence may be excluded if the opponent shows that the circumstances of the statement indicate a lack of trustworthiness.

This second option has the benefit of incorporating language from existing rules, which will help lawyers and judges understand and apply it when they face the language for the first time in Rule 803(3). Moreover, it is flexible enough to accommodate the slightly different approaches to reliability concerns that is found in the case law set forth above.⁶

Tentative language for an amendment and a Committee Note is set forth in Part III.

II. Rule 803(3) and the State of Mind of a Non-Declarant

A statement about a declarant's own state of mind is admissible to prove that the declarant actually had that state of mind at the time of the statement. For example, a statement such as, "I plan to go to lunch today," is admissible to prove the speaker's intent to go to lunch today. It also allows an inference that the speaker followed through on those plans and went to lunch, on the ground that a person's state of mind is probative of conduct consistent with that state of mind.⁷

But what if a declarant purports to describe someone else's state of mind? If a declarant says, "I plan to go to lunch today with John," and the statement is offered to prove that John actually went to lunch with the declarant, the state of mind exception is being extended to cover an opinion by the declarant about someone else's state of mind. The statement "I am going to lunch today with John" is two statements in one. One is "I have an intent to go," and the other is "John has an intent to be there."

There is nothing in the state of mind exception that justifies extending it to prove the state of mind and subsequent conduct of a nondeclarant. Recall that the basis for admitting state of mind statements is that the declarant has a unique perspective into his *own* state of mind. This rationale obviously does not apply to the declarant's opinion about the state of mind of someone else. A declarant might have unique perception of his own state of mind, but he has no special perspective into the thoughts and feelings of another person. Moreover, a statement about somebody else's state of mind is really a product of the declarant's memory or belief. And the state of mind exception specifically excludes statements of memory or belief offered to show the fact remembered or believed. That is because, if memory or belief can be offered to prove the

⁶ See Liesa Richter, *Goldilocks*, at 941:

A trustworthiness escape would resolve the natural tension between the logical rationale for admitting these hearsay statements as the best evidence in most circumstances and the capacity of the exception to admit blatantly self-serving hearsay. It would free the hands of courts and allow exclusion of particular statements that suffer from demonstrable motivational defects.

⁷ *Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285 (1892) (statement of intent admissible to show that the declarant acted in accordance with the intent).

fact remembered or believed under the state of mind exception, then there is no longer a hearsay rule because the exception would swallow the rule: every statement that is made is one of memory or belief.

The question of admitting a declarant's state of mind to prove the state of mind and conduct of another declarant arose in the famous 1892 case *Mutual Life Insurance Co. of New York v. Hillmon*. Mrs. Hillmon brought suit against insurance companies for payment on life insurance after the death of her husband, who she claimed had died in a fire in a campground at Crooked Creek, on the way to Colorado. The insurance companies asserted that Hillmon was alive and that the body discovered was not Hillmon's, but instead that of Walters. Walters had sent letters to his family stating things such as, "I expect to leave Wichita on or about March the 5th with a certain Mr. Hillmon, a sheep trader, for Colorado." The Supreme Court held that Walters' statement that he planned to travel to Colorado was admissible to show that Walters had that plan and therefore was likely to act in accordance with it. Then, the Court stated in dictum that Walters's statement could also be used to prove that Hillmon likely traveled with Walters to that location:

The letters in question were competent . . . as evidence that, shortly before the time when other evidence tended to show that the [declarant Walters] went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention.⁸

Thus the Court was of the opinion that Walters' statements were admissible not only to prove that Walters went toward Colorado, but also to prove that Hillmon went with Walters.

Nearly 100 years after *Hillmon*, Rule 803(3) codified the state of mind exception, and the Advisory Committee wrote, "The rule of *Mutual Life Ins. Co. v. Hillmon*, allowing evidence of intention as tending to prove the doing of the act intended is, of course, left undisturbed."⁹ But does the "rule of *Hillmon*" include the Court's belief that Walters' statement was admissible to prove that both he *and* Hillmon went to the same location? Or is the rule of *Hillmon* simply that Walters' statement is admissible to prove that *he alone* had that plan and followed through on it? The report of the House Judiciary Committee expressed the view that the former was too broad: "the Committee intends that [Rule 803(3)] be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon*, so as to render statements of intent by a declarant admissible only to

⁸ The Court's musings on the use of Walters' statement to prove Hillmon's actions are actually dicta because both the plaintiff and the defendant insurance companies agreed that Hillmon made it to Crooked Creek. See Lynn McLain, "I'm Going to Dinner with Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other than the Speaker—and the Role of the Due Process Clause, 32 Cardozo L. Rev. 373, 384 (2010) ("Under the facts of the case, both parties wanted to show that Hillmon was at Crooked Creek—the insurance company to show that Hillmon had murdered Walters and substituted his body for Hillmon's in an insurance fraud conspiracy, and Mrs. Hillmon to show that the body was Hillmon's—so the point was not one that Mrs. Hillmon would have contested. Justice Gray's statement might be disregarded as dictum on an unbriefed and unargued issue.").

⁹ Advisory Committee Note to Rule 803(3)

prove his future conduct, *not the future conduct of another person*.”¹⁰ The language of the rule itself is silent on whether the exception covers opinions about the state of mind and subsequent conduct of a nondeclarant.

A circuit split has developed with three separate strands. The First, Third, Fourth, and Tenth Circuits have all adhered to the limitation in the House Report, meaning that a declarant’s statements are not admissible to prove a non-declarant’s state of mind or conduct.¹¹ The Ninth Circuit permits the declarant’s statement to be used to show another’s conduct, but only if the trial court gives a limiting instruction that the statement cannot be used to prove the intent or conduct of another and can only be used for the inference that the declarant carried out his intended action (which is an incomprehensible position because the instruction works at cross-purposes with the holding that the state of mind statement can be used to prove the conduct of a nondeclarant).¹² Finally, the Second Circuit has adopted a middle approach, allowing a declarant’s statement to be admitted to prove the conduct of a third party, but only “when there is independent evidence which connects the declarant’s statement with the non-declarant’s activities.”¹³ For example, a declarant’s statement that he intends to meet someone may be “confirmed by later eyewitness testimony that the meeting actually took place.”¹⁴ The problem with the Second Circuit’s view is that the court is reading into the rule a corroboration requirement that is not actually in the text. Federal courts do not have authority to rewrite the Federal Rules of Evidence.

Assuming that the rule should be amended to rectify the conflict in the courts, it is clear that any amendment to address the problem of nondeclarants should prohibit rather than allow the practice. As stated above, the state of mind exception should not cover the state of mind and conduct of a non-declarant, because the declarant has no special perception about the state of mind of another. If an opinion about another person’s state of mind or conduct is admissible to

¹⁰ Notes of Committee on the Judiciary, H.R. Rep. No. 93-650, at 12 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7087.

¹¹ *United States v. Joe*, 8 F.3d 1488, 1493 n.4 (10th Cir. 1993) (“Rule 803(3), however, applies only to a statement of the declarant’s state of mind. An out-of-court statement relating a third party’s state of mind falls outside the scope of the hearsay exception because such a statement necessarily is one of memory or belief.”); *United States v. Jenkins*, 579 F.2d 840, 843 (4th Cir. 1978) (“Approving the Rule in its submitted form, the Congress directed only that it be construed to confine the doctrine in *Hillmon* so that statements of intent by a declarant would be admissible only to prove the Declarant’s future conduct, not the future conduct of others.”); *Gual Morales v. Hernandez Vega*, 579 F.2d 677, 680 n.2 (1st Cir. 1978) (“[T]he statements that this lawyer, who is not a party to this action, is claimed to have made concerning his intention of seeing defendant Arroyo would not be admissible against Arroyo.”); *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 533 (3d Cir. 1976), *overruled on other grounds*, *Crocker v. Boeing Co. (Vertol Division)*, 662 F.2d 975 (3d Cir. 1981).

¹² *United States v. Astorga-Torres*, 682 F.2d 1331, 1336 (9th Cir. 1982) (permitting a statement that the declarant intended to bring others with him subject to a limiting instruction).

¹³ *United States v. Best*, 219 F.3d 192, 198 (2d Cir. 2000).

¹⁴ *United States v. Delvecchio*, 816 F.2d 859, 863 (2d Cir. 1987) (holding the statement inadmissible because “there was no independent evidence of Delvecchio’s presence at the May 11 meeting”); *see also Best*, 219 F.3d at 199 (permitting corroboration by “eyewitness observations” or other “circumstantial evidence”).

prove the state of mind and conduct of another, why not allow *anything the declarant says* to be admissible to prove the facts asserted under the state of mind exception?

In addition, most of the courts do in fact limit the exception to statements of the declarant's state of mind. That clear majority rule is entitled to some deference in any amendment that rectifies a conflict in the circuits.¹⁵

There are two arguments against an amendment. First, the problem does not come up often --- not nearly as often as the "spontaneity" issue discussed in Part I. There are about 40 reported cases on this question since 1980. (Though it might not come up in reported cases after the circuits have weighed in, as six circuits have). Second, the circuit dispute is not all that deep. So far as I can tell, no circuit has held that a state of mind statement, without any qualification, is admissible to prove how a non-declarant acted. Four circuits prohibit the practice absolutely. The Ninth Circuit is problematic with its limiting instruction rule, but a limiting instruction is at least some protection from what should be an impermissible result. And the Second Circuit, while allowing such statements, at least conditions admissibility on a finding of corroborating evidence. So it looks like an amendment barring the practice would have some, but limited, effect.

It should be noted, though, that if the Committee favors an amendment to address the "spontaneity" requirement, then an additional amendment to Rule 803(3) to cover the non-declarant issue becomes much more attractive. The Committee has consistently taken the position that if it is going to amend a rule, it should consider all changes that would improve the rule --- that is, amendments that might not be justifiable on their own may and should be proposed as tagalongs.¹⁶

If an amendment is proposed, what should it look like? The Rule currently provides that a state of mind statement does not include "a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will." A second exception could be added to provide that this Rule does not include "a statement offered to prove the state of mind or conduct of someone other than the declarant." In full, the amended rule would provide that the following is not excluded by the hearsay rule:

A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not:

~~(A) including~~ a statement of memory or belief to prove the fact remembered or believed (unless it relates to the validity or terms of the declarant's will); or
(B) a statement offered to prove the state of mind or conduct of someone other than the declarant.

¹⁵ See the 2019 amendment to Rule 807 (resolving a circuit split on near-misses by adopting the majority view as a tiebreaker, to diminish the transaction cost of the amendment).

¹⁶ An example is Rule 609, currently out for public comment. The reason for the amendment was to fix the Rule 609(a)(1)(B) balancing test; but a change to Rule 609(b) was also proposed, even though it would not have been justified as an amendment on its own due to its infrequent use.

III. Drafts of an Amendment and Committee Note That Addresses Both Spontaneity and Non-Declarants.

Three options are provided. The first two add some kind of trustworthiness requirement. The third would adhere to the initial rule, which does not require a state of mind statement to be spontaneous. All versions include language barring the use of the exception to prove the state of mind and conduct of a non-declarant.

Option 1: Spontaneity and Non-Declarants

(3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A spontaneous statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not:

(A) including a statement of memory or belief to prove the fact remembered or believed (unless it relates to the validity or terms of the declarant’s will);
or

(B) a statement offered to prove the state of mind or conduct of someone other than the declarant.

Committee Note

The amendment makes two changes that are intended to narrow the application of the state of mind exception to the rule against hearsay. First, the amendment requires a finding by the court that the declarant’s expression of a state of mind was spontaneous, as opposed to planned or thought out. Most lower courts have in fact added some form of spontaneity requirement to the rule, even in the absence of rule text. The concern is that the without such a requirement, the exception can be abused by a declarant to manufacture self-serving statements in anticipation of litigation.

Determining whether a state of mind statement is spontaneous requires an evaluation of the totality of circumstances, including the timing of the statement, the time between the statement and the event that is in dispute, and the relationship of the declarant to any possible litigation.

Second, the rule is clarified to provide that the exception does not cover a declarant’s statement when it is offered to prove the state of mind or conduct of someone other than the declarant. For example, a statement “I am going to meet Joe” cannot be offered as proof that Joe intended to meet, nor that he met, the declarant. The justification for the state of mind exception is that the declarant has a unique perception of her own state of mind. That rationale clearly does not apply to the declarant’s opinion about another person’s state of mind or conduct --- any more than it applies to a declarant’s statement offered to prove the truth of a fact remembered or believed. The dictum from *Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285 (1892), is thus rejected. See Notes of Committee on the Judiciary, H.R. Rep. No. 93-650, at 12 (1973),

reprinted in 1974 U.S.C.C.A.N. 7075, 7087 (“[T]he Committee intends that [Rule 803(3)] be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon*, so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.”).

Option 2: Untrustworthiness Clause and Non-Declarants

(3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not:

(A) including a statement of memory or belief to prove the fact remembered or believed (unless it relates to the validity or terms of the declarant’s will); or

(B) a statement offered to prove the state of mind or conduct of someone other than the declarant.

The evidence may be excluded if the opponent shows that the circumstances of the statement indicate a lack of trustworthiness.

Committee Note

The amendment makes two changes that are intended to narrow the application of the state of mind exception to the rule against hearsay. First, the amendment allows the court to exclude a statement if the proponent shows that it is made under circumstances indicating a lack of trustworthiness. This trustworthiness safety valve is derived from Rules 803(6) and (8). Most lower courts have in fact added trustworthiness-based requirements to the rule, even in the absence of rule text. The concern is that, without the opportunity to show untrustworthiness limitation, the exception might be abused by a declarant to manufacture self-serving statements in anticipation of litigation.

Determining whether circumstances indicate untrustworthiness is a flexible process. The goal is to determine whether opponent has shown include that the statement was planned out as opposed to spontaneous, considering such factors as the timing of the statement, the time between the statement and the event that is in dispute, and the relationship of the declarant to any possible litigation.

Like Rules 803(6) and (8), establishing the admissibility requirements of the state of mind exception warrants a presumption that the statement is trustworthy. The burden is on the opponent to show untrustworthiness under the circumstances.

Second, the rule is clarified to provide that the exception does not cover a declarant’s statement when it is offered to prove the state of mind or conduct of someone other than the declarant. For example, a statement “I am going to meet Joe” cannot be offered as proof that Joe

intended to meet, nor that he met, the declarant. The justification for the state of mind exception is that the declarant has a unique perception of her own state of mind. That rationale clearly does not apply to the declarant's opinion about another person's state of mind or conduct --- any more than it applies to a declarant's statement offered to prove the truth of a fact remembered or believed. The dictum from *Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285 (1892), is thus rejected. See Notes of Committee on the Judiciary, H.R. Rep. No. 93-650, at 12 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7087 (“[T]he Committee intends that [Rule 803(3)] be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon*, so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.”).

Option 3: No Spontaneity Requirement and Prohibition on Proof of Non-Declarants' State of Mind and Conduct

(3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health); whether or not spontaneous -- but not:

(A) including a statement of memory or belief to prove the fact remembered or believed (unless it relates to the validity or terms of the declarant's will);
or

(B) a statement offered to prove the state of mind or conduct of someone other than the declarant.

Committee Note

The amendment makes two clarifications to the state of mind exception. First, the rule emphasizes that if the statement describes the declarant's then-existing state of mind, the court has no authority to exclude it on the ground that it is not “spontaneous” or is otherwise untrustworthy. The rule as enacted did not require a showing of spontaneity or trustworthiness, but some courts have engrafted such requirements even though not in rule text. The risk of such requirements is that the trial court may exclude statements --- especially statements of innocence by criminal defendants --- that ought to present questions of weight for the jury. If the statement appears to be engineered for purposes of litigation, the jury is positioned to give such a statement little weight.

Second, the rule is clarified to provide that the exception does not cover a declarant's statement when it is offered to prove the state of mind or conduct of someone other than the declarant. For example, a statement “I am going to meet Joe” cannot be offered as proof that Joe intended to meet, nor that he met, the declarant. The justification for the state of mind exception is that the declarant has a unique perception of her own state of mind. That rationale clearly does not apply to the declarant's opinion about another person's state of mind or conduct --- any more than it applies to a declarant's statement offered to prove the truth of a fact remembered or believed. The dictum from *Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285 (1892), is

102 thus rejected. *See* Notes of Committee on the Judiciary, H.R. Rep. No. 93-650, at 12 (1973),
103 reprinted in 1974 U.S.C.C.A.N. 7075, 7087 (“[T]he Committee intends that [Rule 803(3)] be
104 construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon*, so as to render
105 statements of intent by a declarant admissible only to prove his future conduct, not the future
106 conduct of another person.”).

TAB VII

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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Update on *Smith v. Arizona* and Federal Rule of Evidence 703
Date: October 1, 2025

On June 21, 2024, the Supreme Court decided *Smith v. Arizona*, 602 U.S. 779 (2024), finding that a criminal defendant’s right to confrontation was violated when a prosecution expert testified to the results of a forensic test conducted by a different, non-testifying analyst.¹ The Reporter prepared an agenda memorandum for the Fall 2024 meeting of the Evidence Advisory Committee describing the Supreme Court’s decision in *Smith* and evaluating whether the opinion necessitates an amendment to Federal Rule of Evidence 703.²

Rule 703 regulates the permitted “bases of an expert’s opinion.” Because experts are not called to testify to give first-hand accounts of events and because they rarely have personal knowledge of all information and data used to formulate an opinion for trial, they are not required to have first-hand personal knowledge of everything that goes into an opinion under Rules 602 and 703.³ Instead, Rule 703 specifically permits expert witnesses to *depend upon* otherwise inadmissible hearsay in forming opinions for trial, though the Rule carefully limits the circumstances in which an expert may *reveal* such inadmissible basis information to the jury:

Rule 703. Bases of an Expert’s Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may

¹ The Court assumed, as did the parties and courts below, that the forensic report and findings of the non-testifying expert were testimonial hearsay for purposes of the Sixth Amendment.

² See Memorandum to Advisory Committee on Evidence Rules from Daniel J. Capra Regarding *Smith v. Arizona* and Federal Rule 703 (October 1, 2024), available at [2024-11_evidence_rules_committee_meeting_agenda_book_final_10-24.pdf](#) (Tab 9).

³ See Fed. R. Evid. 602 (requiring that witnesses have personal knowledge but noting that “[t]his rule does not apply to a witness’s expert testimony under Rule 703.”); and Fed. R. Evid. 703 (“An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.”).

disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.⁴

If the Supreme Court’s opinion in *Smith* is interpreted to prohibit prosecutorial experts from relying upon any testimonial hearsay in forming opinions for trial, it undercuts Rule 703 in the criminal context. As the Reporter noted in his Fall 2024 memo, “the Committee has usually taken the position that if a Federal Rule of Evidence is subject to an unconstitutional application on a regular basis, then the rule should be amended to accord with the constitutional standard.”⁵ The Reporter concluded, however, that an amendment to Rule 703 was premature at that time. He recommended that the Committee monitor future cases interpreting *Smith* to determine whether courts find mere expert *reliance* on testimonial hearsay (that is permitted by Rule 703) to be unconstitutional or whether courts find constitutional violations only when expert witnesses *reveal* inadmissible, testimonial hearsay they have used as the basis for a trial opinion to jurors (a practice already severely limited by Rule 703). Only if courts find that the reliance on inadmissible, testimonial hearsay permitted by Rule 703 is unconstitutional would the Committee need to consider amending the Rule.

This memorandum provides an update on the cases interpreting *Smith v. Arizona* in three parts. Part I refreshes the Committee’s recollection regarding the holding in *Smith* and the possible interpretations of the opinion. Part II examines federal and state cases interpreting *Smith* that have been decided since November 2024, revealing conflicting interpretations and applications of the Supreme Court’s holding. Part III explores possible amendments to Rule 703 to signal for courts and lawyers the potential constitutional violation when prosecutorial experts rely upon inadmissible, testimonial hearsay as the basis for a trial opinion.

I. *Smith v. Arizona*, 602 U.S. 779 (2024).

Under *Crawford v. Washington*, the prosecution may not offer testimonial hearsay for the truth of the matter asserted against a criminal defendant unless the defendant has an opportunity to cross-examine the declarant, either at trial or prior to trial if the declarant is unavailable.⁶ In *Melendez-Diaz v. Massachusetts*, the Court held that the reports of a forensic analyst qualify as testimonial statements and that the defense has a Sixth Amendment right to confront the analyst who authored the report when the prosecution offers the report into evidence.⁷ In *Bullcoming v. New Mexico*, the Court held that the prosecution could not satisfy the defendant’s right to confront the analyst who authored a forensic report admitted against him by calling a “surrogate” analyst who had no involvement in the report or the testing that produced it.⁸ In *Smith v. Arizona*, the Court considered whether the defendant’s confrontation rights were violated when the prosecution expert offered an “independent opinion” but revealed the testing and findings of an absent analyst as the “basis” for his trial opinion.

⁴ Fed. R. Evid. 703.

⁵ See Memorandum to Advisory Committee on Evidence Rules from Daniel J. Capra Regarding *Smith v. Arizona* and Federal Rule 703 (October 1, 2024), available at [2024-11_evidence_rules_committee_meeting_agenda_book_final_10-24.pdf](#) (Tab 9).

⁶ 541 U.S. 36 (2004).

⁷ 557 U.S. 305 (2009).

⁸ 564 U.S. 647 (2011).

A. The *Smith* Opinion

In *Smith v. Arizona*, Smith was charged with multiple drug offenses after law enforcement found a large quantity of what appeared to be drugs and drug-related items in his possession.⁹ The substances recovered from Smith's property were sent to a state crime lab for analysis. Analyst Elizabeth Rast conducted the analysis and prepared a set of typed notes and a signed report documenting her lab work and her results. She found that the substances seized from Smith contained both methamphetamine and marijuana.

By the time of Smith's trial, Rast no longer worked for the crime lab. Prosecutors instead called a different analyst, Gregory Longoni to testify. Though he had no prior connection to Smith's case and had no personal knowledge of the testing of the substances seized from Smith, Longoni was called to provide his "independent opinion" regarding the substances seized from Smith. Longoni prepared for his testimony by reviewing the notes and report authored by Rast and when he took the stand, "he referred to those materials and related what was in them, item by item by item."¹⁰ After reviewing Rast's methods and findings on the stand, Longoni offered his "independent opinion" that the substances contained methamphetamine and marijuana. Smith objected and ultimately appealed his conviction on the ground that he was entitled to cross-examine Rast and that calling Longoni as a substitute expert to present her findings violated his confrontation rights. The Arizona Court of Appeals rejected Smith's appeal, holding that Longoni was entitled to offer his "independent opinion" at trial and to rely upon Rast's findings as the "basis" for that opinion. According to the Arizona appellate court, Rast's statements were not admitted for their truth because Longoni relied upon Rast's statements as "basis" only.¹¹

The Supreme Court accepted certiorari and reversed Smith's conviction due to the violation of his right to confront the absent forensic analyst. In a majority opinion authored by Justice Kagan, the Court held that the absent analyst's statements were admitted at trial for their truth: "If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts."¹² The Court emphasized that Longoni reviewed and read from Rast's notes and report on the stand and offered his "independent opinion" dependent entirely on the truth of Rast's statements and findings. The Court noted that permitting this type of substitute testimony would make an end run around the confrontation clause: "every testimonial lab report could come into evidence through any trained surrogate, however remote from the case. And no defendant would have a right to cross-examine the testing analyst about what she did and how she did it and whether her results should be trusted."¹³

In holding that Longoni's testimony violated Smith's Sixth Amendment rights, the Court emphasized repeatedly that Longoni had relayed the absent analyst's findings to the jury during his testimony. At the outset of the majority opinion, the Court stated:

⁹ 602 U.S. 779 (2024).

¹⁰ *Id.* at 791.

¹¹ *State v. Smith*, No. 1 CA-CR 21-0451, 2022 WL 2734269, at *1 (Ariz. Ct. App. July 14, 2022), *vacated and remanded*, 602 U.S. 779, 144 S. Ct. 1785, 219 L. Ed. 2d 420 (2024).

¹² *Smith*, 602 U.S. 779, 783.

¹³ *Id.* at 799.

When an expert *conveys an absent analyst's statements* in support of his opinion, and the statements provide that support only if true, then the statements *come into evidence* for their truth. As this dispute illustrates, that will generally be the case when an expert *relays* an absent lab analyst's statements as part of offering his opinion. And if those statements are testimonial too—an issue we briefly address but do not resolve as to this case—the Confrontation Clause will bar their admission.¹⁴

In a later portion of the opinion, Justice Kagan explains:

Here, the State used Longoni to *relay what Rast wrote down* about how she identified the seized substances. Longoni thus effectively became Rast's mouthpiece. He testified to the precautions (*she said*) she took, the standards (*she said*) she followed, the tests (*she said*) she performed, and the results (*she said*) she obtained. The State offered up that evidence so the jury would believe it—in other words, for its truth.¹⁵

Again, at the conclusion of the opinion, Justice Kagan emphasizes the disclosure of the absent analyst's statements:

A State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. See *Crawford*, 541 U.S., at 68, 124 S.Ct. 1354; *Melendez-Diaz*, 557 U.S., at 311, 129 S.Ct. 2527. Neither may the State introduce those statements through a surrogate analyst who did not participate in their creation. See *Bullcoming*, 564 U.S., at 663, 131 S.Ct. 2705. And nothing changes if the surrogate—as in this case—*presents the out-of-court statements* as the basis for his expert opinion. Those statements, as we have explained, *come into evidence* for their truth—because only if true can they provide a reason to credit the substitute expert. So a defendant has the right to cross-examine the person who made them.¹⁶

Justice Alito, joined by Chief Justice Roberts, concurred in the opinion because he found that Longoni had repeatedly attested to the “truth” of Rast’s out of court statements during his testimony, but he objected to the majority’s conclusion that all basis information that is necessary to an expert’s opinion is necessarily offered for its truth:

Under Rules 703 and 705, Longoni could have offered his expert opinion that, based on the information in Rast’s report and notes, the items she tested contained marijuana or methamphetamine. In so answering, he would acknowledge that he relied on Rast's report and lab notes to reach his opinion. He could have also disclosed the information in the report, if the court found that the probative value

¹⁴ *Id.* at 783 (emphasis added).

¹⁵ *Id.* at 800 (emphasis added).

¹⁶ *Id.* at 802-03 (emphasis added). Justice Gorsuch’s concurrence also emphasized the presentation of the absent analyst’s statements: “I am pleased to join the Court’s opinion holding that, when an expert *presents another’s statements* as the “basis” for his own opinion, he is offering those statements for their truth.” *Id.* at 805. (emphasis added).

of that information substantially outweighed the risk of prejudice. See Fed. Rule Evid. 703. But he could not testify that any of the information in the report was correct—for instance, that Rast actually performed the tests she recorded or that she did so correctly. Nor could he testify that the items she tested were the ones seized from Smith. Smith. Longoni did not have personal knowledge of any of these facts, and it is unclear what “reliable” scientific “methods” could lead him to intuit their truth from Rast's records.

The strictures of the Federal Rules here track the requirements of our Confrontation Clause precedents. If Longoni testified to the truth of the fact that Rast actually performed the tests indicated in her report and notes and that she carried out those tests properly, he violated the Confrontation Clause—assuming, of course, that the notes were “testimonial,” a question that the Court does not reach. But he would also violate the Federal Rules, which do not allow experts to testify to the truth of inadmissible hearsay. In other words, except for the question whether Rast's report was “testimonial,” the Federal Rules and the requirements of the Confrontation Clause are the same. This case thus offers no occasion to blow up the Federal Rules.¹⁷

As it happens, I agree with the Court that Longoni stepped over the line and at times testified to the truth of the matter asserted. The prosecution asked Longoni on several occasions to describe the tests that Rast performed or to swear to their accuracy, and Longoni played along. He stated as fact that Rast followed the lab's “typical intake process” and that she complied with the “policies and practices” of the lab. He also testified that Rast used certain “scientific method[s]” to analyze the samples, such as performing certain tests or running a “blank.” By asserting these facts as true, Longoni effectively entered inadmissible hearsay into the record, thus implicating the Confrontation Clause. The Court could have said that—and stopped there.¹⁸

B. Interpreting *Smith*: Forbidden “Disclosure of” vs. “Reliance on” Testimonial Hearsay

Smith's impact on prosecutorial expert testimony and on Federal Rule of Evidence 703 depends upon whether it is interpreted to foreclose expert *reliance* on testimonial hearsay altogether, or whether it is limited to prohibiting expert *disclosure* of testimonial hearsay.

The majority in *Smith* emphasized the trial expert's actual disclosure of the inadmissible testimonial hearsay of the absent analyst during his trial testimony in holding that this basis information had been admitted for its truth. Because the trial expert's opinion depended on the truth of that basis information, the Court held that the disclosed basis information was “offered” for its truth. If *Smith* signals that prosecutorial experts may not disclose inadmissible, testimonial basis information to the jury, the opinion is not inconsistent with Rule 703 and an amendment to the Rule appears unnecessary. This is because, although Rule 703 permits experts

¹⁷ *Id.* at 819 (Alito, J., concurring).

¹⁸ *Id.* at 819-20.

to *rely* upon inadmissible information upon which other experts in the field would reasonably rely in forming an opinion for trial, it does not allow *disclosure* of inadmissible basis to the factfinder. Indeed, Rule 703 provides that inadmissible basis should *not* be disclosed by the proponent of the expert unless its probative value in helping the jury assess the expert's opinion substantially outweighs its prejudicial and improper substantive use. This onerous balancing test, in effect, means that the proponent of an expert witness should not be disclosing inadmissible basis information to the jury.¹⁹

If, however, the *Smith* opinion means that a prosecutorial expert may not rely upon inadmissible testimonial hearsay *at all* in developing an opinion for trial, that would be inconsistent with Rule 703 and may necessitate an amendment to the Rule to bring it into alignment with confrontation clause jurisprudence. As the Reporter has noted many times, it is suboptimal to have a Federal Rule of Evidence that is capable of unconstitutional application.

Of course, Rules 702 and 703 do not currently allow a “surrogate” trial expert to rely *only* on the ultimate opinion of an absent expert in testifying; such a surrogate expert has no “independent opinion” that is based upon “sufficient facts or data” to offer into evidence.²⁰ Instead, such an expert acts as a mouthpiece for the absent expert, in effect relaying the opinion of the absent analyst for its truth in place of his own opinion.²¹ The prosecution in *Smith* may have presented such a surrogate expert, who merely read the report of the absent expert and offered her opinion as his own during trial testimony.

Rule 703 does permit a testifying expert to rely upon inadmissible hearsay in developing his *own* independent opinion for trial, however. Rule 703 would permit a prosecutorial trial expert to review raw data and testing developed by a third party, along with findings and reports of others to help formulate a truly independent opinion for trial. So long as other experts in the same field would reasonably rely upon such information, the trial expert may depend upon it for its truth and utilize it to form the basis for his own independent expert opinion.²² Under Rule 703, the trial expert would not reveal or disclose inadmissible underlying basis information during his direct testimony. As the Reporter pointed out in his Fall 2024 agenda memorandum, this has happened in many federal cases before *Smith*. Experts have been allowed to testify to conclusions based on testimonial hearsay, so long as they have reached their own conclusions, are not simply parroting the hearsay, and the hearsay is never disclosed to the jury.²³ Of course, it

¹⁹ See Memorandum to Advisory Committee on Evidence Rules from Daniel J. Capra Regarding *Smith v. Arizona* and Federal Rule 703 (October 1, 2024), available at [2024-11 evidence rules committee meeting agenda book final 10-24.pdf](#) (Tab 9) (“The intent of [Rule 703] is to all but prohibit the disclosure of the basis information on direct examination when it is hearsay; it’s a reverse 403 test. The Committee thought it very unlikely that the hearsay’s value in illustrating the expert’s basis would substantially outweigh the risk of misuse.”).

²⁰ See Mueller, Kirpatrick & Richter, *Evidence*, § 7.10 at p. 693 (Wolters Kluwer 2018) (“While an expert may consider remote statements that are not admitted and may be inadmissible, he cannot properly act as a conduit by presenting an opinion that is not his own opinion but that of someone else.”).

²¹ *Id.*

²² See Fed. R. Evid. 703.

²³ See, e.g., *United States v. Law*, 528 F.3d 888 (D.C. Cir. 2008) (The court found that an expert’s testimony about the typical practices of narcotics dealers did not violate Crawford. While the testimony was based on interviews with informants, “Thomas testified based on his experience as a narcotics investigator; he did not relate statements by out-of-court declarants to the jury.”); *United States v. Ramos-Gonzalez*, 664 F.3d 1 (1st Cir. 2011) (“Where an expert

is not always possible for an expert to testify meaningfully without disclosing a testimonial basis. But it is certainly possible in some cases, as seen in the above footnote. If *Smith* is interpreted broadly to mean that a prosecutorial expert must have first-hand personal knowledge of all underlying information and may not rely to any extent upon the truth of testimonial hearsay, it is incompatible with Rule 703.

As described in the case digest below, many courts appear to have interpreted *Smith* broadly to prohibit prosecutorial expert *reliance* on testimonial hearsay even when the underlying hearsay is not disclosed to the jury (as it was in *Smith*).²⁴ When a prosecutorial expert reviews the work and data generated by an absent analyst and develops a trial opinion that depends upon the truth of that absent analyst's statements, the expert could be said to have "indirectly" relayed the underlying testimonial hearsay statements of the absent analyst even if he does not disclose them to the jury. This interpretation of *Smith* spells trouble for Rule 703 in the criminal context because it would limit prosecutorial expert *reliance* on testimonial hearsay that Rule 703 currently allows due to the latitude that experts need in developing trial opinions. This interpretation of *Smith* would also present significant obstacles for laboratories that utilize

witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal. Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation."); *United States v. Ayala*, 601 F.3d 256 (4th Cir. 2010) (no violation of the Confrontation Clause where the experts "did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury."); *United States v. Palacios*, 677 F.3d 234 (4th Cir. 2012) (expert testimony on operation of a criminal enterprise, based in part on interviews with members, did not violate the Confrontation Clause because the expert "did not specifically reference" any of the testimonial interviews during his testimony, and simply relied on them as well as other information to give his own opinion); *United States v. Rios*, 830 F.3d 403 (5th Cir. 2016) (in a prosecution of gang members it was not error to allow a law enforcement officer to testify as an expert about the organization of the gang; the testimony was based in large part on listening to jail conversations and interviewing former members; the court found no violation of the Confrontation Clause to the extent the underlying statements were not transmitted to the jury; the one instance in which a statement was related to the jury was found to be harmless error); *United States v. Turner*, 709 F.3d 1187 (7th Cir. 2013) ("the government could establish through Block's expert testimony what the data produced by Hanson's testing revealed concerning the nature of the substances that Turner distributed, without having to introduce either Hanson's documentation of her analysis or testimony from Hanson herself; and because the government did not introduce Hanson's report, notes, or test results into evidence, Turner was not deprived of his rights under the Sixth Amendment's Confrontation Clause simply because Block relied on the data contained in those documents in forming his opinion."); *United States v. Huether*, 673 F.3d 789 (8th Cir. 2012) (an expert testified in part on the basis of a report by the National Center for Missing and Exploited Children; the court found no confrontation violation because the NCMEC report was not introduced into evidence and the expert drew his own conclusion and was not a conduit for the hearsay); *United States v. Holguin*, 51 F.4th 841 (9th Cir. 2022) (expert testimony on gangs relied on testimonial hearsay; but there was no confrontation problem, because the statements were the type of information upon which other experts in the field rely, and the expert "applied his training and experience to the sources before him and reached an independent judgment without directly repeating what someone told him").

²⁴ This makes some sense from the standpoint of traditional hearsay doctrine in the context of *lay* witnesses. When a witness testifies to information derived from another, it qualifies as hearsay whether the witness references a third-party statement or not. For example, if a law enforcement agent who responded to the scene of a crime is asked on the stand what "he did" immediately after questioning eyewitnesses, and he testifies that he "arrested the defendant," the defense has a valid hearsay objection even though the agent did not reference or repeat any out-of-court statement. The agent has no personal knowledge of who committed the crime and is indirectly conveying the out-of-court accusation of the eyewitnesses. This is typically characterized as "indirect hearsay." See e.g., *United States v. Reyes*, 18 F.3d 65, 67-69 (2d Cir. 1994) (error to let agent say she spoke with two men and concluded that defendant and another were involved in crimes; she conveyed hearsay).

numerous different analysts in receiving and testing samples in steps or stages and that experience frequent turnover. While retention of all samples for personal retesting by a trial expert could resolve concerns about analysts who have become unavailable by the time of trial, presenting findings that involve multiple different analysts at different stages of evaluation could prove difficult, if not impossible. And as the Reporter noted in his Fall 2024 agenda memo, there are some areas of well-accepted prosecutorial expertise – such as gang expertise -- that depend wholly on the hearsay of absent witnesses.

Other courts appear to have interpreted *Smith* more narrowly to prohibit “surrogate” experts who have no independent opinion and to prohibit the disclosure of testimonial hearsay by prosecution experts, but to allow continued expert *reliance* on some hearsay from absent analysts that could be considered testimonial. These courts would allow a testifying prosecutorial expert to rely upon testing done by an absent analyst, raw data produced by an absent analyst, as well as reports and other information generated by an absent analyst to develop an independent opinion for trial. These courts are particularly inclined to accept testimony from an expert who is a supervisor or “technical reviewer” in the lab producing the underlying data and who does have first-hand, personal knowledge of the testing procedures employed and who has reviewed “raw data” developed by the absent analyst in reaching an independent opinion for trial. Some courts have permitted testimony by such technical reviewer experts even though the trial opinion depends upon the truth of statements made by absent analysts about the receipt and preparation of samples, the calibration and preparation of testing equipment or tools, the performance of tests and the results produced.

Part II below describes cases interpreting *Smith* since November 2024.

II. Cases Interpreting *Smith v. Arizona*

The Supreme Court’s decision in *Smith* has led many lower courts to reexamine prosecutorial expert testimony in criminal cases.²⁵ And many courts appear to be interpreting *Smith* broadly to prevent expert testimony that is based to any extent on testimonial hearsay even when the testimonial out-of-court statements are not conveyed to the jury. Still, other courts have interpreted *Smith* to permit some expert reliance on the hearsay statements and work of an absent analyst where the testifying analyst has served as a “technical reviewer” on the case or has developed a truly “independent opinion” based on raw data from underlying testing performed by others.

A. Cases Holding that Expert Reliance on Testimonial Hearsay Violates the Sixth Amendment

Many post-*Smith* cases have characterized its holding broadly to prohibit a testifying expert from relying on the testimonial hearsay of an absent analyst in developing an independent opinion for trial. This interpretation of *Smith* renders Rule 703 unconstitutional as applied in certain circumstances. Although there are many cases along these lines, one federal Circuit case and one state Supreme Court case have offered a detailed analysis of this issue.

²⁵ The Supreme Court’s holding in *Smith* has generated a significant amount of work for the lower courts. I reviewed 167 cases citing *Smith* that were decided between November 2024 and September 2025.

In *United States v. Seward*, the Fourth Circuit Court of Appeals held that testimony by a prosecutorial DNA expert violated the defendant's confrontation clause rights.²⁶ Seward was charged with the murder of a mail carrier and the government offered testimony from a DNA expert at trial that the DNA samples collected from the scene of the crime matched the DNA collected from Seward. The Fourth Circuit found that the testimony of the DNA expert violated the defendant's rights under *Smith* because:

The DNA expert testified for the government that she was 'not hands on with the evidence' and that another analyst performed the testing of the DNA samples linked to the defendant. The DNA expert explained that 'her role was to review the analyst's notes and work, and then to 'independently review the [analyst's] conclusions' to ensure she agreed with the analyst. The DNA expert discussed 'each DNA sample taken from the crime scene, testified that her 'lab analyze[d]' each swab (seemingly according to the procedures she had explained earlier), and provided her conclusions—all without having tested the samples herself.²⁷

The appellate court held that this testimony violated Seward's confrontation rights because the testifying expert "*relied on the work produced by another analyst to reach her expert conclusions. As in Smith, the witness 'could opine' about the DNA profile produced by the other analyst only because [she] accepted the truth of what [the non-testifying analyst] had reported about her work in the lab. And, as in Smith, the non-testifying analyst's statements thus came in for their truth ... because they were admitted to show the basis of [the DNA expert's] opinions.*"²⁸

The Fourth Circuit acknowledged that the testifying expert had not relayed or reported the statements or findings of the absent analyst in the same way that the expert in *Smith* had. According to the Fourth Circuit, the defendant's confrontation rights were violated notwithstanding this lack of disclosure:

To be sure, the testifying witness in *Smith* more overtly put the non-testifying analyst's out-of-court statements on the record than the government's DNA expert did here. By contrast, the DNA expert at Seward's trial first testified extensively about her lab's typical procedure for analyzing swabs and then about her analysis of the swabs that had been collected in this case. The obvious implication—indeed, the only way the testimony makes sense—is that the DNA expert was representing that the non-testifying analyst who ran the underlying tests in fact followed the procedures the DNA expert had just described. But the government may not sidestep the Sixth Amendment problems created by having a witness testify to their opinions that *are founded on a non-testifying analyst's out-of-court statements by simply omitting any questions about the analyst's work.* Approving

²⁶ 135 F.4th 161 (4th Cir. April 25, 2025) (DNA expert's reliance on work product of absent analyst violated the defendant's confrontation rights; error harmless due to overwhelming evidence of Seward's guilt apart from DNA evidence).

²⁷ *Id.* at 168.

²⁸ *Id.* (emphasis added).

that practice would make *Smith* and several other post-*Crawford* decisions a dead letter, and allow for easy evasion of the Confrontation Clause.²⁹

Recently, the Supreme Judicial Court of Massachusetts held that a testifying technical reviewer's reliance on the testing and statements of an absent analyst violated the defendant's rights under *Smith* in *Commonwealth v. Gordon*.³⁰ In that case, an attorney was prosecuted for passing "sixty-one strips" allegedly containing illegal drugs disguised as legal papers to an inmate during a prison visit.³¹ Prior to trial, a crime lab analyst conducted testing on the strips and determined that they contained illegal drugs:

Dunlap concluded that the strip contained a mixture of buprenorphine and naloxone, commonly referred to as Suboxone. In her written, initialed notes marked by the crime lab identification number, Dunlap recorded the procedures she said she undertook to reach her conclusion, including, inter alia, her receipt of the strips from the Plymouth County sheriff's department, the procedures she employed to perform an initial screening test, the protocols she followed to prepare the strip for further analysis, her use of gas chromatography-mass spectrometry (GC-MS) for a confirmatory test, and her conclusion based on the foregoing that the strip contained Suboxone. Also in the case file were a printout from the database Dunlap said she used during the screening test and the GC-MS output from the confirmatory test Dunlap said she performed.³²

By the time of trial, the analyst who performed the drug tests on the strips was no longer employed by the lab and the prosecution presented the testimony of a "technical reviewer," who was a supervisor in the lab, to offer an "independent opinion" regarding the composition of the strips:

Carrie LaBelle, a supervisor at the crime lab, reviewed the case file pursuant to the crime lab's technical and administrative review procedures. LaBelle, who was familiar with the protocols and procedures of the crime lab, was not involved in the testing performed by Dunlap; she neither observed nor participated in Dunlap's testing... At trial, LaBelle testified that she was 'responsible for performing technical and administrative reviews' of her peers' work. She explained that technical review means that 'we will go through the case file, we'll review all of their submitted data, we'll review their notes, and we make sure that the notes and the conclusions that they've drawn from them are supported scientifically,' and that '[t]he administrative review portion is looking for administrative aspects such as having a laboratory number on every page and having the analyst's initials on every page.' LaBelle stated that she performed the technical and administrative reviews of Dunlap's work on the defendant's case.

²⁹ *Id.* (emphasis added). Because there was overwhelming evidence of Seward's guilt apart from the DNA evidence, the Fourth Circuit found the Sixth Amendment error harmless and affirmed the conviction.

³⁰ No. SJC-13735, 2025 WL 2655687, at *1 (Mass. Sept. 17, 2025) (testimony by lab supervisor who did not perform initial drug testing violated defendant's confrontation rights in prosecution for passing a "strip" allegedly containing illegal drugs to a prison inmate).

³¹ *Id.*

³² *Id.* at *2.

LaBelle acknowledged that she had not herself performed or observed the testing on any of the seized strips. Instead, LaBelle testified that Dunlap ‘analyzed the specific substances.’³³

In offering her opinion, the trial expert did disclose the underlying testimonial statements of the absent analyst:

LaBelle proceeded to relay the contents of Dunlap's notes, testifying as to the steps Dunlap recorded having performed for an initial screening test and for a confirmatory test using the GC-MS.³⁴

The trial expert also testified that she reviewed and relied upon data produced by the absent analyst’s procedures for herself:

LaBelle also testified that she herself observed the pharmaceutical identification markings on the strips, and reviewed a printout from a database that Dunlap's notes indicated Dunlap used for the initial screening, as well as the GC-MS output, both of which were in the case file alongside Dunlap's notes. LaBelle stated that she reviewed ‘the same data results that the person who did the initial analysis saw,’ and that those results allowed her ‘to make a determination, to a scientific degree of certainty’ as to the identification of the analyzed substance.³⁵

The testifying expert offered her “independent opinion” regarding the composition of the strips:

She opined that, ‘in reviewing the data printouts independently, as another forensic scientist, the data support[] a conclusion of buprenorphine and naloxone,’ which LaBelle confirmed was commonly known as Suboxone.³⁶

The majority found that the supervisor’s testimony violated the defendant’s confrontation rights, not only because she disclosed testimonial statements made by the absent analyst, but also because she *relied* upon them and accepted them as true in forming her own opinion:

As in *Smith*, the substitute expert testified to the contents of the analyst's notes. As in *Smith*, the analyst's out-of-court statements provided support for the substitute expert's opinion only if the analyst's statements were true. And, as in *Smith*, the substitute expert's opinion identifying the controlled substance *was not independent of the analyst's statements*; in short, the proffered opinion identifying the controlled substance, which the Commonwealth concedes depended on the analyst's notes, ‘merely replicate[d], rather than somehow buil[t] on, the testing analyst's conclusions.’ ... We conclude that the original analyst's statements set forth in her notes were out-of-court statements admitted for their truth. Further concluding that the absent analyst's statements were testimonial and that the admission of those statements, *as well as the substitute expert's opinion founded*

³³ *Id.*

³⁴ *Id.* at *3.

³⁵ *Id.*

³⁶ *Id.*

on the truth of the absent analyst's statements, was not harmless beyond a reasonable doubt, we vacate the defendant's conviction.”³⁷

In so doing, the majority rejected the finding of the intermediate appellate court that the testifying expert had offered an “independent opinion” that did not violate the confrontation clause.³⁸ Relying on the Fourth Circuit’s analysis in *Seward*, the court found that the testifying analyst’s independent opinion violated the defendant’s confrontation clause rights because that opinion was based on the truth of the absent analyst’s testimonial hearsay:

We conclude that, in light of the Supreme Court's decision in *Smith*, where a substitute expert's opinion is *dependent upon the truth of a nontestifying analyst's testimonial hearsay*, the confrontation clause bars admission of the opinion even if the substitute expert is familiar with the testing analyst's laboratory protocols and reviewed the analyst's case file; an expert's opinion *based on an absent analyst's test results that depends also on the truth of the analyst's testimonial hearsay* as to the processes and protocols she said she followed to obtain those results is precluded by the confrontation clause.³⁹

The majority also rejected the prosecution’s argument that the trial expert’s role as a supervisor and contemporaneous “technical reviewer” of the absent analyst’s work prevented a constitutional violation. The majority held that a testifying expert must have first-hand, personal knowledge of the underlying testing that forms the basis for her opinion in order to satisfy the confrontation clause:

To be sure, LaBelle also was the technical and administrative reviewer of Dunlap's work, reviewing Dunlap's notes contemporaneously for quality assurance. But the record does not indicate that LaBelle's contemporaneous role provided her with any *personal knowledge* as to the truth of the statements in Dunlap's notes upon which she relied in forming her opinion. LaBelle's technical and administrative reviews, and her conclusion that Dunlap complied with laboratory protocols and procedures, rested on the truth of Dunlap's statements as to the process Dunlap said she undertook and the sample Dunlap said she tested; LaBelle observed none of these actions reported by Dunlap. ...Informed by the Supreme Court's reasoning in *Smith*, we conclude that LaBelle's opinion identifying the controlled substance was “independent” in name only. She reviewed the GC-MS output, which was not testimonial hearsay, but her opinion identifying the controlled substance, including her interpretation of the GC-MS output, was dependent on the truth of Dunlap's out-of-court testimonial statements.⁴⁰

³⁷ *Id.* at *1 (emphasis added).

³⁸ *Id.* at *10-11 (“We turn to consider whether, despite the constitutional violation attendant to LaBelle's conveying Dunlap's testimonial hearsay to the jury, the portion of LaBelle's testimony stating her ‘independent’ opinion was admissible. Specifically, based on her review of Dunlap's notes, the database printout, and the output from the GC-MS, LaBelle opined that the ‘data support[] the identification of’ Suboxone.”).

³⁹ *Id.* at *13.

⁴⁰ *Id.* at *16.

The majority went on to address the impact of the Sixth Amendment on the Massachusetts counterpart to Federal Rule of Evidence 703.⁴¹ The majority reasoned that the demands of *Smith* call Massachusetts' common law counterpart to Rule 703 into question in criminal cases.⁴² The majority reasoned:

[U]nder our evidentiary rule, LaBelle's reliance on the facts and data recorded in Dunlap's notes would not have precluded LaBelle from providing her opinion. She was the crime lab supervisor, familiar with the crime lab's protocols and procedures; in fact, prior to her supervisory role, LaBelle had been an analyst. She performed the technical and administrative reviews on the case file. LaBelle's testimony was "independent" under our evidentiary rule because she reviewed the raw data from Dunlap's work, including the database printout and GC-MS output, which supported the identification of the controlled substance because Dunlap's testimonial hearsay stated that the data were generated according to proper protocols and procedures. As such, LaBelle's opinion would have been admissible under our evidentiary rule. Following *Smith*, this aspect of our evidentiary rule, which permits a substitute expert who is a supervisor of the crime lab to provide an opinion regarding raw data generated by an absent analyst that depends on the truth of the testimonial hearsay of an absent analyst as to the processes and protocols she says she followed to obtain the data, no longer comports with the right of confrontation, and the admission of such expert opinion testimony is an error of constitutional dimension.⁴³

According to the majority opinion in *Gordon*, therefore, Federal Rule of Evidence 703 should be amended to prevent its unconstitutional application.

The concurring opinion in *Gordon* illustrates the ambiguity in *Smith* and the conflict in the courts regarding its application. The concurring justices agreed that some testimonial hearsay was *revealed* to the jury as "basis" as outlawed by *Smith*, necessitating reversal in the case. But the concurring justices worked to preserve Rule 703 and the practice of allowing the testimony

⁴¹ Massachusetts has not adopted rules of Evidence: "Because Massachusetts has not adopted rules of evidence, the development of Massachusetts evidence law continues to be based on the common law and legislative processes." MA R EVID § 102, Editors' Note. The Massachusetts version of the Rule 703 standard differs from Federal Rule of Evidence 703 as well. It provides that expert witnesses may rely upon: "(a) facts observed by the witness or otherwise in the witness's direct personal knowledge; (b) evidence already in the record or that will be presented during the course of the proceedings, which facts may be assumed to be true in questions put to the witness; and (c) facts or data not in evidence if the facts or data are independently admissible in evidence and are a permissible basis for an expert to consider in formulating an opinion." MA Guide to EVID § 703. Unlike Fed. R. Evid. 703, which permits opinions based on inadmissible evidence of a type reasonably relied upon by experts in the relevant field, Massachusetts law requires the facts or data underlying an opinion to be independently admissible, even if not actually admitted. See *Dept. of Youth Servs. v. A Juvenile*, 499 N.E.2d 812 (Mass. 1986). But under this standard, the Supreme Judicial Court of Massachusetts had approved testimony by a substitute analyst prior to the Supreme Court's decision in *Smith*. See *Commonwealth v. Grady*, 54 N.E.3d 22, 30 (Mass. 2016) ("[e]xpert opinion testimony, even that which relies for its basis on ... test results of a nontestifying analyst not admitted in evidence, does not violate a criminal defendant's right to confront witnesses against him under either the Sixth Amendment or art. 12 of the Massachusetts Declaration of Rights."), *abrogated by Comm. v. Gordon*, 2025 WL 2655687 (Mass. Sept. 17, 2025).

⁴² *Gordon*, 2025 WL 2655687, at *17.

⁴³ *Id.* at *18.

of a technical reviewer consistent with the Sixth Amendment. The concurrence argued that a truly “independent opinion” from a reviewer familiar with the lab and its processes based on the review of raw data generated by another analyst should be constitutionally admissible even if it depends upon some testimonial statements by the absent analyst about the testing that was done:

The court reads *Smith* as if it announced a categorical rule that any exposure by a substitute expert to testimonial hearsay, however incidental, taints the entirety of that expert's opinion, even when the opinion rests on independent analysis of raw, machine-generated data. According to the court, when a testifying expert relies both on machine-generated data -- which, as discussed below, is not testimonial hearsay -- and on a nontestifying analyst's statements about ‘the processes and protocols she said she followed to obtain those results,’ the entire opinion becomes inadmissible under the confrontation clause. *Smith* imposes no such bright line rule. Rather, *Smith* addressed the admissibility of hearsay *conveyed* by a testifying expert in support of that expert's opinion. The Supreme Court held that when ‘an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true,’ the statements are offered for their truth and are inadmissible if testimonial. ... It is only when the expert functions as a “conduit” for a nontestifying analyst's opinion that the testimony becomes inadmissible testimonial hearsay.⁴⁴

Accordingly, the concurrence opined that a “technical reviewer,” who has personal knowledge of the laboratory that performed the testing and of the processes and protocols used by the lab, can offer an independent opinion based on raw data generated by an absent analyst’s work *even if that opinion depends upon the truth of testimonial statements made by the absent analyst*:

Accordingly, expert opinions based on raw, machine-generated data remain admissible under the confrontation clause, even after *Smith*. A qualified expert may testify to her own opinion based on machine output -- such as a GC-MS printout -- even if she did not personally conduct the underlying test. ... Even so, whether an expert's opinion is based on machine-generated data is not the only consideration in determining the admissibility of that opinion. We have long required that a testifying expert possess meaningful knowledge of the relevant laboratory processes, typically through affiliation with the laboratory, familiarity with its protocols, or service as a technical reviewer of the prior analyst's work. Nothing in *Smith* disturbs this rule. ... Where the expert has sufficient familiarity with the laboratory's standard protocols, or has served as the technical reviewer, the defendant retains a fair opportunity to test the basis for the expert's conclusions. Cross-examination may probe whether the expert made unwarranted assumptions, failed to account for potential error, or over-relied on data that appear flawed or incomplete. Although the expert may not be able to answer how a particular analyst performed a specific procedure, the expert must still be able to

⁴⁴ *Id.* at 21-22 (emphasis added) (citations omitted).

explain why the raw data can be trusted and how, in the expert's independent judgment, that raw data supports the conclusion offered at trial.⁴⁵

The concurrence would have permitted an expert like the technical reviewer to offer an “independent opinion” based on the absent analyst’s work product had she not relayed her testimonial hearsay statements to the jury:

At trial, LaBelle was asked whether she could state, with ‘a degree of scientific certainty,’ the identity of the controlled substance reflected in the data she reviewed. She responded, ‘[I]n reviewing the data printouts independently, as another forensic scientist, the data supports a conclusion of Buprenorphine and Naloxone.’ Notably, she did not refer to or adopt Dunlap's conclusions; instead, she testified based on her own interpretation of the ‘data.’ The critical question is what ‘data’ LaBelle relied upon. Even assuming, as the court does, that Labelle's reference to ‘data’ included some testimonial hearsay from Dunlap's notes, that alone does not render her opinion inadmissible. The relevant inquiry is whether her conclusion rested on an independent analysis. Labelle's testimony that she reached her conclusion ‘with a degree of scientific certainty,’ strongly indicates that she did not simply repeat Dunlap's conclusions. To express that level of certainty, she necessarily would have relied primarily, if not exclusively, on the GC-MS results. ... Whether LaBelle relied primarily or exclusively on the GC-MS output, her opinion reflected an independent judgment, not a surrogate endorsement of Dunlap's conclusions. It therefore did not violate the confrontation clause.⁴⁶

Finally, the concurrence explained that the majority’s interpretation of *Smith* would depart from existing precedent and practice because it would require prosecutors to call every technician and analyst involved in processing a sample for cross-examination at trial:

The court's interpretation of *Smith* appears to suggest that only the analyst who performed the testing may testify to raw data, because such data is typically derived from the execution of ‘processes and protocols.’ But that reading unnecessarily departs from settled precedent. Had the Commonwealth introduced only the GC-MS results and called LaBelle to interpret them live at trial, there would be no confrontation clause violation. In substance, that is precisely what occurred here. This court has long held that the central concern is not whether the expert ‘pushed the button’ on the machine, but whether the expert formed an independent opinion and can be meaningfully cross-examined. The confrontation clause does not demand the impossible -- cross-examination of a machine or every technician who performed a mechanical step in a standardized process.⁴⁷

⁴⁵ *Id.* at 23-24.

⁴⁶ *Id.* at 24-25.

⁴⁷ *Id.* at 25-26.

Several opinions at both the state and federal levels have also interpreted *Smith* broadly to prohibit a testifying prosecutorial expert from *relying on* the testimonial statements of an absent declarant for their truth in forming an opinion for trial.

District Court Cases

- **Stanfield v. Clement, 775 F. Supp. 3d 1104, 1118 (D. Idaho 2025)** (characterizing *Smith* in habeas context as prohibiting expert reliance on testimonial hearsay: “Dr. Rorke-Adams *relied on* testimonial hearsay as the basis for her opinion; therefore, the State was required to produce the lab technician as a witness to be confronted at trial.” Even if the state court’s holding was erroneous, it was not objectively unreasonable for purposes of habeas relief) (emphasis added).
- **Garcia v. Montgomery, No. 2:22-CV-01209-HDV, 2024 WL 4820230, at *8 (C.D. Cal. Aug. 13, 2024)**, report and recommendation adopted, No. 2:22-CV-01209-HDV (MAR), 2024 WL 4820356 (C.D. Cal. Nov. 18, 2024) (including conflicting statements about expert reliance on testimonial hearsay but characterizing *Smith* as prohibiting expert reliance on testimonial hearsay: “*Smith*, 144 S. Ct. at 1788 (holding that an expert opinion implicates the Confrontation Clause if the testifying expert’s opinion is “predicated on the truth” of the non-testifying expert’s factual statements)”); finding no confrontation violation because “Detective Verna’s testimony was *explicitly limited* to his observations and [] did not *rely on* the coroner’s statements or findings.”) (emphasis added).
- **United States v. Pascoe, No. 3:22-CR-88-DJH, 2024 WL 3610362, at *1 (W.D. Ky. July 31, 2024)** (characterizing *Smith* as prohibiting expert reliance on testimonial hearsay and granting defense motion in limine to “exclude any testimony offered at trial that is *premised upon* CJDs issued at the request of Homeland Security Investigations if the officers who prepared the CJDs are not also called as witnesses and subject to cross-examination.” “Where the prosecution seeks to offer in-court expert testimony that is *based on the expert’s review of out-of-court testimony*, the out-of-court statements are offered for their truth and the expert’s testimony must be excluded. *See Smith v. Arizona*, 144 S. Ct. 1785, 1800-01 (2024).”) (emphasis added).
- **United States v. Moore, No. 1:23-CR-47, 2024 WL 3324817, at *11 (S.D. Ohio July 2, 2024)** (characterizing *Smith* as foreclosing any “reliance” on absent forensic experts and authorizing expert testimony based upon trial expert’s personal knowledge and testing only: “The government acknowledges the shift in personnel, as its notice reports that the original examiners are no longer employed by the lab. But it explains that the proposed witness has tested the drugs herself and will testify based on her personal knowledge of the tests she performed and the results she obtained. Moreover, the government explains that it will provide the proper foundation validating that the drugs tested are the same ones obtained during the investigation by proffering the chain of custody at trial. As presented, such expert evidence may validly be admitted at trial, so long as the proffered witness testifies only to *her* actions with respect to the evidence in question and *does not rely on the prior analysts’ work in doing so*. *See Smith v. Arizona*, No. 22-899, 2024 WL

3074423, at *7–*10 (U.S. June 21, 2024).”) (emphasis added).

State Supreme Court Cases

- **Hall-Haught v. State, 2025 WL 1523492, 569 P.3d 315 (Wash. 2025)** (finding that defendant’s Sixth Amendment rights were violated under *Smith v. Arizona* where lab supervisor testified that defendant was under the influence of THC and referenced and relied upon findings and report of non-testifying analyst who conducted testing: “At her jury trial, the State called Katie Harris, a supervisor with the Washington State Patrol Toxicology Laboratory, who testified that she was not the technician who tested the blood samples, but that she reviewed and signed off on the lab report of Hall-Haught’s blood samples testing.” “Harris’ opinion was admitted for its truth. Similar to Longoni’s testimony in *Smith*, Harris’ opinion was *predicated* on the nontestifying technician’s toxicology test report.”) (emphasis added).
- **State v. Gleason, 339 A.3d 774, 777 (Me. 2025)** (conviction vacated where trial court permitted prosecution technical reviewer to testify based upon testing performed by a nontestifying analyst under Maine’s counterpart to Rule 703: “Deisher did not prepare the samples, run the tests, or export the data from the instruments to the computer; nor did she personally observe other lab employees doing those things. Using the data generated by others, Deisher conducted an independent review to develop a toxicology report. Deisher acknowledged that her independent review ‘rel[ied] upon the assumption that all the testing sequences and processes were properly followed.’ Deisher also recognized that the data she reviewed was the product of judgments made by other reviewers and lab employees. Deisher *relied on the truth of the documentation and the data that had been generated by others*. Moreover, Deisher could only assume that the samples tested by the other lab employees came from the victim.” “Applying the rule announced in *Smith*, we conclude that the data and record of the lab procedures are out-of-court statements being offered for their truth because if the tests did not reveal the presence of fentanyl, Deisher’s expert opinion would have been of no value to the prosecution.”) (emphasis added).
- **State v. Thomas, 334 A.3d 686 (Me. 2025)** (confrontation clause barred a technical reviewer’s expert opinion identifying a controlled substance based on raw data from tests performed by an absent chemist where that opinion was dependent on the truth of the testimonial hearsay statements documenting how the chemist generated that raw data even though absent chemist’s report was not admitted into evidence; rejecting State’s argument that the substitute expert’s opinion did not violate the confrontation clause because the expert “had conducted an independent review of [the nontestifying chemist’s] data and had ‘independently concluded based on the data that the substance tested in [that] case [was] fentanyl.’” “Chemist Two *relied on* the truth of the notes and the generated data, and his testimony regarding his independent review of that data was offered for the truth of the results of the forensic testing that Chemist One had performed.”) (emphasis added).

State Appeals Court Cases

- **People v. Soliz, No. 2D CRIM. B333746, 2024 WL 4813915, at *1 (Cal. Ct. App. Nov. 18, 2024)** (reversing drug conviction with testimony by surrogate analyst; underlying testimonial hearsay was actually disclosed but court states that mere reliance would violate Sixth Amendment as well: “Therefore, the trial court erred in admitting the report, as well as the portions of Booth's testimony based on that report. As to Booth's testimony, *his opinion was derived in part from the improperly admitted report*. Booth's additional consideration of Contreras's notes, data, and analysis does not eliminate the problem that reliance on her report poses.”) (emphasis added).
- **State v. Miller, No. A24-0205, 2025 WL 583178, at *2 (Minn. Ct. App. Feb. 24, 2025)**, review denied (May 28, 2025) (reversing and remanding for new trial due to admission of toxicology report signed by testifying prosecution expert: “Although J.S. signed the toxicology report that was offered at trial and offered her ‘own independent review’ of the test results, she did not conduct or observe the testing that was done. Like the surrogate witnesses in *Smith* and *Bullcoming*, the *basis* of J.S.’s opinion comes from the opinions of analysts who performed the testing. Miller was entitled to confront those analysts who were witnesses against him.”) (emphasis added).
- **State v. Clark, 909 S.E.2d 566 (N.C. App. 2024)** (trial expert could not rely upon report and work of nontestifying expert who performed laboratory tests (that were not admitted into evidence); trial witness had to “independently test” the substance in order to offer testimony consistent with the Sixth Amendment: “forensic lab results obtained by an original analyst cannot form the “basis” of a “substitute” expert's testimony, “[w]ithout independent testing on ... [the] part [of the substitute expert.]”).
- **State v. Hale, 2024 WL 4901601 (Ohio App. 2024)** (reliance on testimonial hearsay by a testifying expert who offered an independent, final opinion in a lab that adopted a “teamwork approach” to testing violates the confrontation clause regardless of whether the testifying expert directly reveals or relays out of court statements by the non-testifying analysts: “In other words, Dailey and Schepeler reviewed information gathered from physical testing performed by others, in order to reach a conclusion regarding the likelihood that the samples came from the same donor. While Dailey and Schepeler compared and analyzed notes and data from other analysts, they appear to have reached independent and original conclusions.” “Based on the descriptions above, we conclude that Dailey and Schepeler [“relayed or relied upon out-of-court statements”] in two ways: (a) by making factual assertions regarding what procedures were performed and what precautions were followed *without personal knowledge*, and (b) by *using underlying data*, derived from those same laboratory tests, as the *basis* for their conclusions.”) (emphasis added).
- **State v. Smiley, 2025 WL 2171058 (Ohio App. 2025)** (testifying DNA analyst testified to and relied upon the testing analyst's testimonial statements and notes for their truth, violating defendant's confrontation rights; error harmless).

B. Cases Holding that Expert Disclosure of Testimonial Hearsay Violates the Sixth Amendment but Permitting Some Reliance on an Absent Expert's Work

Other courts have interpreted *Smith* more narrowly to foreclose “surrogate” experts who have developed no truly independent opinion and to prohibit the disclosure of testimonial hearsay by prosecution experts. But these courts would allow qualified prosecutorial experts who have reasonably relied on some testimonial hearsay in forming an independent opinion to testify consistent with the Sixth Amendment. A recent opinion from the Georgia Supreme Court illustrates this view of *Smith*.

In *Johns v. State*, the defendant was convicted of murder in connection with a stabbing.⁴⁸ The defendant argued that his confrontation rights under *Smith* were violated when the trial court permitted a medical examiner to provide testimony about the victim's cause of death when she was not the person who performed the autopsy on the victim.⁴⁹ The medical examiner based her trial testimony about the victim's cause of death on her “peer review” of autopsy photographs and of a draft autopsy report prepared by the forensic pathologist who performed the autopsy but who did not testify at trial. The defendant objected under *Smith* and the Georgia Supreme Court found no confrontation violation where the testifying expert testified to her own independent opinion about the cause of death and did not relay the absent analyst's statements to the jury, even though she relied upon them in forming her own opinion:

We have explained that a defendant's rights under the Confrontation Clause are not violated when ‘the State [does] not seek to admit [an] autopsy report itself, but rather ask[s] [a second expert] his independent, expert opinion regarding the facts contained in that report and associated documents.’ Dr. Sullivan was that second expert in Johns's case. At trial, Dr. Sullivan, a pathologist, testified that as a general practice, autopsies performed at the Fulton County Medical Examiner's Office are peer-reviewed, meaning that a second pathologist independently reviews the autopsy photographs and the primary pathologist's draft report and that the peer-reviewing pathologist forms his or her own expert opinion as to the victim's cause and manner of death. According to Dr. Sullivan, that is what happened here: Cason's autopsy was conducted by Dr. Aiken, the primary pathologist, and then Dr. Sullivan conducted a peer review. Dr. Sullivan testified that she reviewed ‘the case information that the investigator had prepared initially, and then [she] viewed the photographs that had been taken during [Cason's] autopsy, and Dr. Aiken's draft report,’ and that her independent, expert opinion regarding Cason's cause and manner of death were based on these materials.

But the State never sought to admit the materials prepared by Dr. Aiken, the medical examiner who performed Cason's autopsy. Instead, Dr. Sullivan *used the facts contained in Dr. Aiken's preliminary report, along with the autopsy photographs, to inform her expert opinion* regarding the cause of Cason's injuries and the cause of death. In other words, ‘[t]he expert opinion admitted at trial was

⁴⁸ No. S25A0875, 2025 WL 2308987 (Ga. August 12, 2025).

⁴⁹ *Id.* at *5.

not the restatement of the diagnostic opinion of another expert,’ the Confrontation Clause was not violated, and Johns’s claim therefore fails.⁵⁰

Several other courts appear to interpret *Smith* similarly to permit a testifying prosecution expert to rely upon the testimonial hearsay of an absent analyst in forming an independent opinion for trial.

Circuit Cases

- **United States v. Thompson, 119 F.4th 445, 448–49 (6th Cir. 2024)** (characterizing *Smith* as prohibiting disclosure of underlying testimonial hearsay; court stated that it was a “close call” as to whether the testimony violated *Smith* but found any error harmless due to overwhelming evidence as to the causation of the victim’s death apart from the testimony: “Dr. Darinka Mileusnic-Polchan, the chief medical examiner for Knox County, Tennessee, testified about the cause of Jones’s death. Dr. Mileusnic-Polchan did not author the autopsy report herself, but her testimony was based on her review of the report and the underlying photographs.” “In *Smith*, the Court reasoned that the Clause’s protections apply when a substitute analyst offers ‘independent’ conclusions while conveying the substance of the underlying report.”) (emphasis added).
- **United States v. Earle, No. 24-48, 2025 WL 1540947, at *2 (9th Cir. May 30, 2025)** (“Reviewing de novo, the district court did not violate Earle’s Confrontation Clause rights. Unlike the expert in *Smith v. Arizona*, 602 U.S. 779 (2024), the supervisory forensic examiner testified about his own report and did not rely on a non-testifying expert’s report. Although the Government’s expert *did not conduct the DNA tests himself*, he supervised and directed the team of lab technicians who performed the tests and provided him with the results. He interpreted the results, drew conclusions, and wrote those conclusions in a Report of Examination, which was the basis of his testimony at trial.”) (emphasis added).

State Supreme Court Cases

- **Watkins v. State, 912 S.E.2d 574 (Ga. 2025)** (court characterizes *Smith* as holding that an “expert witness who *restates* an absent laboratory analyst’s factual assertions in support of his own opinion testimony violates the Confrontation Clause;” reversing drug possession counts where analyst’s testimony relating the factual assertions in absent analyst’s forensic report violated the defendant’s Sixth Amendment rights under *Smith v. Arizona*. “The record shows—and the State concedes—that the State *offered Sloan’s report and Karpf’s testimony relating the factual assertions in Sloan’s report* to prove the truth of the matter asserted, i.e., that Sloan’s test results showed the substance was in fact cocaine. Watkins had no opportunity to cross-examine Sloan before or at trial. For these reasons, Karpf’s testimony relating the factual assertions in Sloan’s report violated the Confrontation Clause under the United States Supreme Court’s decision in *Smith*, and therefore the trial court clearly and obviously erred in admitting it.”) (emphasis added).

⁵⁰ *Id.* at *5-6 (emphasis added).

State Appeals Court Cases

- **State v. Pogue, 2025 WL 452628 (Ala. Crim. App. 2025)** (denying State mandamus relief from order granting defendant a new trial because testimony of surrogate expert based upon statements and findings of retired forensic analyst that were admitted into evidence violated defendant's Sixth Amendment rights under *Smith v. Arizona*. "Because the State *offered the certificate of analysis* executed by Steele through Burns, a surrogate analyst -- even though Burns used the results of Steele's analysis as the basis of her expert opinion -- and *that certificate was admitted into evidence*, Judge Taylor did not err in granting Pogue's motion for new trial.") (emphasis added).
- **Jackson v. State, No. 14-24-00241-CR, 2025 WL 1934181, at *1 (Tex. App. July 15, 2025)**, petition for discretionary review filed (Sept. 16, 2025) (no confrontation violation where testifying expert compared Defendant's DNA to a DNA profile generated by a private lab from samples taken from the victim many years earlier. "Powers's reports do not purport to convey the substance of any out-of-court statement by Bode or its analysts. And appellant does not direct us to any assertions in those reports that he contends constitute testimonial hearsay. To be sure, *Powers relied on DNA profiles Bode developed*. But because Powers's reports document her own opinions and conclusions based on work she performed, and because they do not contain out-of-court statements by Bode, the Confrontation Clause does not bar their admission. The State did not use Powers's reports as a surrogate to introduce any findings or assertions by Bode... none of Bode's reports or underlying data came into evidence." (emphasis added).⁵¹
- **Gourley v. State, 710 S.W.3d 368, 372 (Tex. App. 2025), petition for discretionary review refused (May 7, 2025)** (expert's testimony that defendant's "blood contained 190 nanograms of methamphetamine per milliliter" and "thirty-six nanograms of amphetamine per milliliter" based on tests run by two absent analysts did not violate confrontation clause "because the toxicology report was not admitted into evidence and because Anderson had performed an independent review of the raw data from the testing and formed his own conclusions from that data.").
- **State v. Kellum, No. A-1-CA-41306, 2025 WL 1179936, at *1 (N.M. Ct. App. Apr. 23, 2025)** (no confrontation violation where expert offered an independent opinion based upon testing and raw data produced by an absent analyst: "Barber explained that while he was basing his opinions on both the notes and report Caleb created, Barber also personally reviewed the data produced by the GC/MS machine Caleb used. Indeed, Barber stated that he personally went to the machine Caleb used to conduct the test and reviewed "some of the data" on that machine." "On cross-examination, Barber conceded that he was primarily relying on the materials Caleb "created and printed out," that he personally did not retest anything, and that he was relying on Caleb to have correctly followed all of the proper steps and procedures when testing the drugs." Court found no Sixth Amendment violation: "Barber reviewed the actual data produced by Caleb's test, a

⁵¹ The *Jackson* court also found that the raw data comprising the DNA profile that was generated by the private lab was not testimonial: "the DNA profile developed by the non-testifying analysts was not testimonial because the computer-generated data stood for nothing without further analysis."

circumstance not present in *Smith*.” The court acknowledged in a footnote that the analysis would change if the New Mexico Supreme Court found that any reliance on the absent expert violates a defendant’s confrontation rights because: “Here, Barber acknowledged before the jury that he was relying on Caleb's written assertions that she followed the lab's policies when testing the substances at issue.”).

- **Swims v. State, No. 2023-KA-01244-COA, 2025 WL 2218140, at *2 (Miss. Ct. App. Aug. 5, 2025)** (forensic pathologist permitted to testify to cause of death based upon autopsy report and autopsy photos generated by an absent pathologist; although admission of autopsy report was inconsistent with *Smith*, the majority held that the pathologist’s opinion based upon his review of the autopsy photos was admissible. One judge dissented from this portion of the opinion: “*Smith* specifically rejects the surrogate testimony of experts like LeVaughn, who have no prior connection with a case but offer an ‘independent expert opinion’ using testimonial hearsay. Here, LeVaughn had no involvement in the preparation or review of the autopsy. In essence, the opinion LeVaughn offered was the opinion Arboe formed as a result of the autopsy that he had performed. LeVaughn made no additional analysis, and the State used LeVaughn to relay what Arboe found; to use the *Smith* Court's word, LeVaughn effectively became Arboe's mouthpiece.”).
- **Dunlap v. State, No. 969, Sept. Term, 2023, 2025 WL 1039557, at *8 (Md. Ct. Spec. App. Apr. 8, 2025)**, cert. denied, 491 Md. 645, 340 A.3d 694 (2025) (cell phone extraction report authored by nontestifying agent that was admitted into evidence through testimony of a different digital forensics expert did not violate defendant’s 6th amendment rights because testifying expert was a “technical reviewer” on the report who reviewed and signed off on findings at time of report: “Detective Michael Zito, from the Montgomery County Police Electronic Crimes Unit, was admitted as an expert in digital forensics examination. He conducted a “technical review” of the report for the extraction of data from appellant's Samsung Galaxy Note 10 cell phone. The report he reviewed was performed by another member of the Electronic Crimes Unit, Corporal Webster, who had retired by the time of appellant's trial and did not testify. Corporal Webster's report showed that he sent the phone to an outside vendor (Cellebrite) to bypass the phone's security before he extracted the full file system data from appellant's phone.”).
- **State v. McElveen, 2023-0939 (La. App. 1 Cir. 12/30/24), 406 So. 3d 429, 445, reh'g denied (Apr. 2, 2025)** (no confrontation violation in allowing DNA expert to testify who had not originally handled and analyzed defendant’s DNA sample: “Mr. Shawhan reviewed every step of the process to verify that the established procedure for handling and analyzing the defendant's sample had been followed. Assuming the supplemental results generated after the defendant was identified as a suspect in this case were testimonial, the State was properly allowed to introduce them through Mr. Shawhan, a participant in the process. Thus, the supplemental report and related testimony were properly admitted under *Smith*, *Bullcoming*, and *Melendez-Diaz*.”).
- **State v. Shea, No. A23-1523, 2024 WL 4115377, at *5 (Minn. Ct. App. Sept. 9, 2024)** (no confrontation violation under *Smith* where absent analyst tested DNA sample taken from crime scene to create a profile and tested DNA sample taken from defendant to find

a match where testifying expert was the technical reviewer on the case who “finaliz[ed] the BCA's conclusions by independently reviewing the machine-generated DNA profiles.” “B.K. provided her independent opinion, as the technical reviewer, based solely on the machine-generated DNA profiles.”).

- **Luong v. State, No. 05-24-00817-CR, 2025 WL 2308883, at *3 (Tex. App. Aug. 11, 2025)** (testifying analyst reviewed “the case records as well as the raw data, the chromatograms, and the quantitative data from the HPLC [high performance liquid chromatography] analysis” conducted by deceased analyst; no confrontation violation because “an expert's testimony based on a scientific forensic analysis that was performed by a nontestifying scientist is admissible if (1) the expert independently analyzes the data generated by the nontestifying scientist and develops her own conclusions from the data and (2) the lab report created by the nontestifying scientist is not offered into evidence.”).

Other courts have avoided the issue of a testifying expert’s reliance on nontestifying participants in a testing process by finding that the testifying expert relied *exclusively* on machine-generated output or that the underlying assertions relied upon were nontestimonial.

- **Wilkinson v. State, No. 02-24-00316-CR, 2025 WL 2552336, at *1 (Tex. App. Sept. 4, 2025)**, petition for discretionary review filed (Sept. 8, 2025) (no confrontation violation when one digital expert testified about cell phone data extraction performed by another: “Detective Kaether testified that Sergeant T. Lawrence performed the Cellebrite extraction on Wilkinson's phone and initially reviewed the report and that he, Detective Kaether, peer-reviewed the report. Detective Kaether testified that his review determined that the initial extraction had been successful.” “Thus, he testified about his own analysis of the data and was subject to cross-examination on that basis. Because the report was not testimonial and because Detective Kaether's testimony satisfied the Confrontation Clause, the trial court did not violate Wilkinson's Sixth Amendment right to confrontation by admitting the evidence”).
- **Baldwin v. Commonwealth, No. 2023-SC-0544-MR, 2025 WL 2671451, at *7 (Ky. Sept. 18, 2025)** (absent analyst performed data extraction from defendant’s phone: “In this case, the Cellebrite analyst that extracted the raw data from Baldwin's cellphone did not make any testimonial statements about that data or provide any input to produce that data. ... This Court is satisfied that Baldwin's Confrontation Clause rights were not violated because they were never implicated to begin with, and we affirm.”).
- **State v. Kestle, 24-192 (La. App. 5 Cir. 3/5/25)**, 411 So. 3d 30, 41, writ denied, 2025-00431 (La. 6/3/25), 410 So. 3d 785 (no confrontation violation because testifying medical examiner relied solely on autopsy photographs taken by absent examiner in offering trial opinion).
- **State v. Aragon, 555 P.3d 571, 572 (Az. Ct. App. 2024)**, review denied (Apr. 1, 2025) (rejecting defendant’s argument that state was required to call “as a witness the technician who downloaded data from her car's event data recorder (EDR).” “The trial court instead satisfied Aragon's confrontation rights by allowing her to cross-examine the

detective who relied on the EDR data in reconstructing the crash.” “As we explained in *Ortiz*, courts have generally concluded that the ‘failure to call a technician from the preliminary steps’ of a process does not violate the Confrontation Clause.”).

- **People v. Sims, No. A167809, 2024 WL 5163107, at *5 (Cal. Ct. App. Dec. 19, 2024), review denied (Mar. 26, 2025)** (holding that testimony of DNA analyst regarding sample with several contributors did not violate confrontation clause even though it relied on preliminary testing and preparation of sample by absent analysts because preliminary notes and preparation of absent analysts were for internal purposes and were not testimonial. “In addition, we agree with the Attorney General that the electropherograms (*and any attendant notations linking the data to either the evidence found at the crime scene or Sims*) were not made with the requisite degree of formality to be considered testimonial”) (emphasis added).
- **State v. Tate, 918 S.E.2d 886, 896 (N.C. Ct. App. 2025)** (no confrontation violation where testifying state crime lab technician analyzed defendant’s DNA, compared it to DNA profile generated by third-party lab, and identified a match because DNA profile generated by third-party lab was nontestimonial: “Sorenson’s DNA profile was not testimonial in nature since it was not generated ‘*solely* to aid in the police investigation’ of Defendant.”).

III. Possible Amendments to Federal Rule of Evidence 703

The question for the Committee is whether to initiate work on an amendment to Rule 703 to account for the holding in *Smith*. On the one hand, there is an argument to be made that any amendment is still premature. The impact of the Supreme Court’s confrontation holding in *Smith* remains uncertain and the lower courts are divided over a prosecutorial expert’s ability to rely on testimonial hearsay in arriving at an independent opinion for trial. Given the conflict in the lower courts and the ubiquity of prosecutorial expert testimony in a wide array of criminal cases, the Supreme Court may weigh in on this issue again in the near future, potentially mooted any rulemaking work accomplished in the intervening time. Further, as illustrated below, crafting a specific amendment to Rule 703 that accounts for the constitutional concern in light of remaining uncertainty could prove challenging. The Committee would want to highlight constitutional concerns regarding expert use of testimonial hearsay in the criminal context without unnecessarily restricting expert testimony more than is constitutionally required.

On the other hand, the Committee may wish to proceed with work on an amendment to Rule 703 where it may be unconstitutional as applied in its current form. *Smith* makes clear that a prosecutorial expert may not relay as “basis” the testimonial hearsay of an absent declarant that must be true for the expert’s opinion to be valid.⁵² Although Rule 703 severely restricts the disclosure of an expert’s inadmissible basis during direct examination, it does permit such disclosure when the “probative value” of that inadmissible basis information

⁵² *Smith v. Arizona*, 602 U.S. 779 (2024).

substantially outweighs the prejudicial impact on the jury.⁵³ Under *Smith*, no balancing test can justify the disclosure of testimonial hearsay by a prosecution expert.

Furthermore, in the fifteen months since *Smith* was decided, many federal and state courts have held that mere *reliance* on testimonial hearsay by a prosecution expert violates a criminal defendant's confrontation clause rights. And Rule 703 very clearly permits all experts to rely upon inadmissible basis information upon which other experts in the field would reasonably rely, without any limitation on prosecutorial experts. If this broad view of *Smith* represents the majority approach to confrontation, amending Rule 703 sooner rather than later could be important. In its current form, Rule 703 does not alert prosecutors or defense counsel that compliance with the provision could result in a constitutional violation. Thus, an amendment highlighting the constitutional concern could serve as an important signpost.

In his Fall 2024 memo, the Reporter suggested the following potential amendment to Rule 703:

Rule 703. Bases of an Expert's Opinion Testimony.

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in formulating an opinion on the subject, they need not be admissible for the opinion to be admitted; but an expert may not rely on testimonial hearsay when testifying against a defendant in a criminal case, in the absence of cross-examination of the declarant. ~~But if~~ the facts or data relied upon by an expert would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.⁵⁴

An amendment like this one would ensure that prosecution experts do not violate a defendant's confrontation rights through reliance on non-testifying witnesses. But an amendment like this one appears to be premature for two principal reasons. First, it may go further than is constitutionally necessary in light of the remaining ambiguity in the *Smith* decision. The Supreme Court has yet to hold that prosecution experts may not rely to any extent on testimonial hearsay in developing opinions for trial. The majority in *Smith* found that the expert testimony violated the defendant's confrontation rights because the expert "relayed" testimonial hearsay to the jury. It remains to be seen whether a prosecution expert may rely on some testimonial hearsay in developing an opinion so long as that underlying hearsay is not disclosed to the jury as the "basis" for the testifying expert's opinion. As such, this amendment option may curtail prosecution expert testimony more than is constitutionally required. And as

⁵³ Fed. R. Evid. 703 (applying reverse Rule 403 balancing test to permit disclosure of inadmissible basis on direct).

⁵⁴ See Memorandum to Advisory Committee on Evidence Rules from Daniel J. Capra Regarding *Smith v. Arizona* and Federal Rule 703 (October 1, 2024), available at [2024-11_evidence_rules_committee_meeting_agenda_book_final_10-24.pdf](#) (Tab 9).

the Reporter noted in the Fall 2024 memo, a Rule 703 that prohibits all reliance on testimonial hearsay could exclude a lot of expert testimony that has been routinely accepted:

It should be noted that prohibiting even reliance on testimonial hearsay will call into question the admissibility of a good deal of law enforcement expert testimony about matters like the practices of drug conspiracies. Much of that testimony is based on interviews with arrestees, and that is testimonial hearsay. *See, e.g., United States v. Kamahele*, 748 F.3d 984 (10th Cir. 2014) (a government expert’s testimony about the structure and operation of the gang, based in part on interviews with cooperating witnesses and other gang members, did not violate the Confrontation Clause where the expert “applied his expertise, formed by years of experience and multiple sources, to provide an independently formed opinion”). It is not obvious that the *Smith* Court is intending to cover such reliance on testimonial hearsay.⁵⁵

Secondly, this amendment option tracks the *Crawford* confrontation paradigm by outlawing reliance on “testimonial” hearsay. To be sure, the *Crawford* construct has controlled confrontation clause analysis for more than two decades and there is no indication from the Court of any potential change to the Sixth Amendment focus on “testimonial” hearsay. Still, this area is dynamic, and some Supreme Court justices have expressed dissatisfaction with *Crawford* and have suggested that some alteration may be due. In a denial of certiorari on March 24, 2025, Justices Alito and Gorsuch both called for reconsideration of the *Crawford* test and of the primary purpose test used to evaluate the “testimonial” nature of hearsay statements.⁵⁶ Although it seems unlikely that the Sixth Amendment focus on only “testimonial” hearsay will change, it could be ill-advised to enshrine the *Crawford* “testimonial” standard in Rule 703 only to have the Supreme Court change its approach to the confrontation clause in the future. Thus, it would still seem premature to amend Rule 703 to expressly prohibit any “reliance” on “testimonial” hearsay by a prosecutorial expert.

If the Committee thinks it is important to amend Rule 703 sooner rather than later to signal the constitutional issue lurking in Rule 703, however, it may consider a more generic change that would prohibit “unconstitutional” reliance upon and disclosure of basis information by a prosecutorial expert generally. Such a generic change to Rule 703 might look something like this:

Rule 703. Bases of an Expert’s Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate

⁵⁵ *Id.*

⁵⁶ *Franklin v. New York*, 145 S. Ct. 831, 836, 221 L. Ed. 2d 546 (2025).

the opinion substantially outweighs their prejudicial effect. In a criminal case, an expert may not rely upon or disclose inadmissible facts or data that would violate a defendant's constitutional rights.

First, an amendment like this one retains crucial flexibility for all expert opinion testimony outside the prosecutorial context and allows all other experts to continue reliance on inadmissible basis information as appropriate. But an amendment like this one would serve as a signal to judges and lawyers that prosecutorial experts may not rely upon or disclose inadmissible basis information to the same extent that other experts may. It would lead them to the caselaw in their jurisdiction to determine whether and under what circumstances, prosecutorial expert testimony violates a defendant's confrontation rights. It would also act as a constitutional signpost that is sufficiently flexible to follow Supreme Court decisions in this area wherever they may lead, without requiring successive amendments to adapt to evolving confrontation precedent. Should the Supreme Court ultimately clarify that prosecution experts *may*, in some circumstances, rely upon testimonial hearsay in developing opinions for trial, this amended version of Rule 703 would continue to permit such constitutional reliance. If, however, the Supreme Court ultimately prohibits *all* expert reliance on testimonial hearsay, Rule 703 would prohibit it as well. And if the Supreme Court alters the confrontation clause standard developed in *Crawford v. Washington*, an amended Rule 703 with this general constitutional admonition would remain viable.

One might argue that such a constitutional proviso is unnecessary because the admissibility of evidence under all of the Federal Rules is limited by the Constitution. Rule 402 spells that out:

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.⁵⁷

It would certainly be superfluous to include a constitutional proviso in every Federal Rule of Evidence to underscore this foundational point. But such a constitutional signpost may be appropriate in particular evidentiary rules that are uniquely susceptible to unconstitutional application. For example, Federal Rule of Evidence 412, the rape shield rule, utilizes a similar general constitutional proviso in allowing evidence of a victim's other sexual behavior or sexual predisposition in a criminal case "whose exclusion would violate the defendant's constitutional rights."⁵⁸ This exception to Rule 412's exclusionary rule signals the potential constitutional concerns in connection with the exclusion of this defense evidence but does not spell out specific circumstances in which the evidence is allowed. It instead defers to evolving constitutional

⁵⁷ Fed. R. Evid. 402.

⁵⁸ Fed. R. Evid. 412(b)(1)(C). *See also* Advisory Committee's note to 1995 amendment ("Under subdivision (b)(1)(C), evidence of specific instances of conduct may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution.").

precedent. In this way, the exception avoids being superseded by future Supreme Court decisions. The Committee could choose to deploy a similar generic constitutional exception to the Rule 703 standard that allows expert reliance upon inadmissible facts or data and, in rare circumstances, disclosure of that inadmissible basis to the jury.

Conclusion

The impact of the Supreme Court's decision in *Smith v. Arizona* remains uncertain and lower courts are split as to its effect on Federal Rule of Evidence 703 in the criminal context. On the one hand, it may make sense to begin work on a generic constitutional amendment to Rule 703 where it is clear that prosecution experts may not disclose testimonial hearsay as "basis" after *Smith* and where lawyers may benefit from a signal in rule text alerting them to potential constitutional defects in the presentation of expert testimony in criminal cases. On the other hand, the Committee may wish to continue monitoring the cases and to wait to see whether the Supreme Court will resolve any conflict over the interpretation of *Smith* before recrafting the well-accepted standards for expert witness basis found in Federal Rule of Evidence 703.

TAB VIII

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Rule 104(a) and (b)
Date: October 1, 2025

Rule 104(a) and (b) regulate the court's evaluation of proffered evidence before it can be submitted to the jury. Currently these provisions state as follows:

Rule 104. Preliminary Questions

- (a) In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
- (b) Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

Rule 104(a) makes the important point that in deciding preliminary issues of fact, the trial judge is ordinarily not bound by the rules of admissibility. But one failing of Rule 104(a) is that it does not specify the *standard of proof* required for the court to find that the evidence is admissible. For example, a statement is admitted as an excited utterance only if the declarant was under the influence of the startling event. That is a fact question for the court --- but how convinced must the court be before finding that the declarant was under the influence of the startling event?

The question of the applicable standard of proof for Rule 104(a) determinations was answered in *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), where the court stated that “[t]he preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration.” But, in the run-up to the 2023 amendment to Rule 702, the Committee found that litigants and courts often failed to recognize that the

preponderance standard applied to the reliability requirements of Rule 702. The Committee found that the problem was, in part, that if you looked at the text of Rule 104(a), you saw nothing about a standard of proof. So the Committee might consider whether the preponderance standard should be added to the text of Rule 104(a).

Rule 104(b), in contrast, does set forth a standard of proof, one less stringent than Rule 104(a) --- evidence sufficient to support a finding. That standard purportedly applies only for questions of “conditional relevance” --- when the probative value of one piece of proffered evidence depends on the existence of another. (For example, when a statement is offered to prove someone’s state of mind, it is conditioned on that person having heard it.) The Supreme Court described how the “sufficient to support a finding” standard is to work, in *Huddleston v. United States*, 485 U.S. 681, 687 (1988):

In determining whether the [proponent] has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the [proponent] has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact * * * by a preponderance of the evidence.

Essentially, Rule 104(b) leaves the finding of the preliminary fact to the jury, except when it would simply be a waste because there is not enough evidence for anyone to find a fact. This low, Rule 104(b) standard is also explicitly applied in three specific Evidence Rules: Rule 602 (personal knowledge); 901(a) (authenticity); and 1008 (best evidence rule, fact questions about secondary evidence).

There are two ways that Rules 104 might be usefully amended.

1. The easiest amendment for the Committee to consider is simply to add the preponderance of the evidence standard to the text of Rule 104(a) --- so courts and litigants don’t have to go looking beyond the text to find the applicable standard of proof for preliminary issues other than those found in Rule 702.

2. The Committee could go further and amend Rule 104(b) to reject the concept of “conditional relevance,” by applying the sufficient to support a finding test to all questions of relevance, and leaving all other deviations from the preponderance standard to specific rules. The rationale for this amendment is that conditional relevance is a confusing concept; it does not actually help anyone figure out when the standard of proof for a preliminary question should be governed by a standard of proof lower than a preponderance; and it promotes a fallacy that conditional relevance is any different from relevance --- especially because the courts apply the same approach to questions of relevance and conditional relevance.

This short memorandum is in three parts. Part One discusses the possibility of adding the preponderance standard to the text of Rule 104(a). Part Two discusses the possibility of going further and applying the “sufficient to support a finding” test to all questions of relevance. Part three provides possible drafts.

It must be emphasized that no vote will be taken on any proposed amendment to Rule 104 at the Fall meeting. This is a preliminary memo. The question for the Committee is whether there is any proposal that should be subject to further consideration at the next meeting.

I. Adding the Preponderance Standard to Rule 104(a)

The rationale for adding the preponderance standard to the text of Rule 104(a) is pretty simple: it's an important rule of law, and it is not in the text of the rule itself. You have to go through case law to find it.

Surely, good lawyers will be able to find the appropriate standard of proof under the current rule. But as Judge David Campbell (the former Chair of the Standing Committee) said, the rules are not for good lawyers. The rules are for lawyers who come to the rules unprepared, without experience. That is why it is important to have the basic rules in text (as opposed to in the Committee Notes or case law). The Committee has already determined that much of the confusion about *Daubert* and Rule 702 derived from the fact that the preponderance standard was not in the rules. The whole idea of the 2023 amendment was to make that explicit in the text. So why not go further and establish, in text, the standard of proof for all other preliminary questions of fact?

There are, however, contrary arguments to adding to the text of Rule 104(a), stemming from the fact that Rule 702 was recently amended. The Committee Note to the 2023 amendment recognizes the anomaly of adding the preponderance standard to Rule 702 alone. It states that:

There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of that rule.

Adding to the text of Rule 104(a), now, in light of that Committee Note, leads to two questions:

1) Why amend Rule 104(a) if the Committee stated that the major problem is Rule 702, and that is now fixed?; and

2) Why didn't the Committee simply add the preponderance standard to Rule 104(a) in 2003, instead of amending Rule 702?

As to the first question, preliminary research does not indicate that courts and litigants are routinely and wrongly applying a Rule 104(b) standard to the other preliminary questions in the Federal Rules of Evidence. See, e.g., *United States v. Harrison*, 206 F.3d 994 (10th Cir. 2002) (whether a defendant adopted a statement is a preliminary question of fact to be decided by the court, and the court determines the question under a preponderance of the evidence standard). There *is*, though, a problem that has arisen with respect to party-opponent statements under Rule 801(d)(2)(A) that has resulted in a split in the circuits. The fact situation is that the government seeks to admit the defendant's inculpatory statement against him, and the defendant argues that

the statement was not made by him: it's not his handwriting, it's not him in the recording, etc. One court has found that the statement is admissible if the government provides a prima facie case --- essentially looking at the question as one of authenticity. *See United States v. Gil*, 58 F.3d 1414 (9th Cir. 1995) (it's for the jury to decide whether it was the defendant who made the statement). But Rule 801(d)(2)(A) provides that a hearsay is admissible against the adversary if it "was made by the party in an individual or representative capacity"; the preliminary fact on which admissibility is based is that the party-opponent made the statement. Thus, other courts have properly found that the government must prove to the court by a preponderance that the defendant made the statement. *See United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014) (government was required to, and did, establish that the defendant more likely than not made the proffered statements); *United States v. Harvey*, 117 F. 3d 1044 (7th Cir. 1997) (suggesting that a preponderance standard applies, but finding it unnecessary to decide because the government satisfied the preponderance standard). So this is one of the problems that could be corrected by an amendment to Rule 104(a).

If the Committee might be interested in the amendment, I would conduct more thorough research for the next meeting to determine whether other mistakes are being made as to the standard of proof for other preliminary questions.

Yet it could be argued that the rule should be amended even if there is not significant deviation from the preponderance standard in preliminary determinations. This could be thought of as a good housekeeping rule --- codifying an important ruling from the Supreme Court on a very important evidentiary issue. (Indeed, the other holding in *Bourjaily*, about the use of the hearsay statement itself to prove agency, *was* codified in 1996). Arguably, even if there is no large problem, the amendment does no harm, and makes the evidence rules easier to apply going forward.

As to the second question --- why did the Committee amend Rule 702 rather than Rule 104(a) in 2023 --- the answer is that the Committee believed that amending Rule 702 specifically would have more impact on the problem it was addressing than an amendment to the general rule. The thought was that, again, inexperienced users would not go to Rule 104(a) to solve a problem in Rule 702. And it would have been odd and confusing to amend Rule 104(a) and 702 at the same time, with the same exact amendment. That said, there is a possibility that eyebrows will be raised by the Committee's preponderance of the evidence timeline, if the Committee decides to propose an amendment to Rule 104(a).

Part Three sets forth a possible amendment, and Committee Note, if the Committee is interested in an amendment that would add the preponderance of the evidence standard to Rule 104(a).

II. Eliminating the Concept of "Conditional Relevance"

Rule 104(b) distinguishes facts that are "conditionally relevant" from those that are "relevant." If a fact is conditionally relevant, proof of it requires only sufficient evidence to support a finding that the fact exists. As stated above, in *Huddleston v. United States*, 485 U.S. 681, 690 (1988) the Court described the trial court's approach to conditional relevance as follows:

In determining whether the [proponent] has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the [proponent] has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact * * * by a preponderance of the evidence.

In contrast, simple questions of relevance do not fall under Rule 104(b). So presumably, proof of a fact that is relevant appears to be covered by Rule 104(a).

The Advisory Committee does not explain why facts that are conditionally relevant are to be treated differently from facts that are relevant. The Committee Note makes the distinction but does not explain why it is necessary:

In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus, when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled “conditional relevancy.” Problems arising from it are to be distinguished from problems of logical relevancy, e.g., evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing, treated in Rule 401.

The Committee thus found a distinction but doesn’t really say why it should be important.

Many commentators have concluded that the very concept of “conditional relevance” is confusing and unnecessary. There is no special reason to hold that proof of a fact should be treated differently because the fact is conditionally relevant.

The most prominent critic of the “conditional relevance” construct is Professor Ron Allen. In his article, *The Myth of Conditional Relevance*, 25 Loyola L. Rev. 871-884, 879 (1992), Professor Allen notes that evidence is either relevant or is not. The fact that it is “conditional” in some cases does not call for different treatment. He explains as follows:

No evidence is simply relevant in its own right. Evidence is relevant only because there is an intermediate premise or set of premises that connects the evidence to some proposition involved in the litigation. But if determining the relevance of evidence always requires relying on some intermediate premise, no distinction can be drawn between relevancy and conditional relevancy.

The fact is, when the relevance of one fact is conditioned on another, the concept of “conditional relevance” applies, unhelpfully, to *both* facts; they are conditional on each other, so the term takes you nowhere. Professor Allen considers a contract action in which there are two factual disputes: whether there was an offer and acceptance, and whether one of the parties had the authority to execute the contract. He states that “[t]he received wisdom says evidence of offer and acceptance is conditionally relevant upon proof of authority, but of course the reverse is also true.

Evidence of authority is conditionally relevant upon proof of offer and acceptance.” Similarly, if the question is whether the defendant heard an accusation and whether he adopted it, the relevance of each fact is dependent on the other: you can’t adopt what you don’t hear, but also, the relevance of hearing it is “conditioned” on whether he adopted it. There is no reason at all to impose a different standard of proof to facts that are “conditionally” relevant.

It appears that the confusing treatment of conditional relevance is not just a theoretical problem. Rule 104(b) is explicitly limited to relevancy conditioned on fact. The obvious implication is that the drafters believed that there was some other kind of relevancy not conditioned on fact. The only other kind of relevancy is that defined in Rule 401. So, is relevancy under Rule 401 a Rule 104(a) question? It would seem to be so, but that is a poor result, because the lower standard is provided for conditional relevance, which presumably would be the more problematic evidence. Another possibility is that relevancy is neither a Rule 104(a) nor a Rule 104(b) question. This seems to be what the Advisory Committee intended, but it doesn’t square with Rule 104(a) and (b), which purport to cover all preliminary questions. And there is nothing in Rule 401 about a standard of proof. It is anomalous to read the Federal Rules of Evidence as failing to provide a standard of proof for the most fundamental requirement of all evidence.

There is evidence in the case law that courts treat questions of relevance under the same low standard of proof as that set forth for conditional relevance. The most recent example is *Palin v. New York Times*, 113 F.4th 245, 272 (2d Cir. 2024). In this libel case, one of the disputed issues was the admissibility of certain articles that debunked assertions made by the Times concerning the effect of Palin’s positions on the shooting of a Congresswoman. The trial judge excluded the articles, finding that there was insufficient evidence that Bennet, the Times editor, had heard about or read the articles. The Second Circuit found that the articles were “conditionally relevant” and all that Palin had to show was evidence sufficient to support a finding that Bennet was aware of the articles. The Second Circuit concluded that “the district court abused its discretion in concluding that a reasonable juror could not find by a preponderance of the evidence that Bennet read and remembered the Excluded Articles.” So the court applied the sufficient to support a finding standard to the “conditionally relevant” fact.

After that, the *Palin* court considered the trial court’s exclusion of evidence that Bennet’s brother was a Democratic presidential candidate, who had been threatened. This was not a question of conditional relevance. Bennet was aware of all this evidence. The question was whether that awareness made a disputed fact more or less likely. The trial court found the evidence irrelevant under Rule 401. The Second Circuit disagreed in the following passage:

This evidence was relevant. A *reasonable juror* could infer that the aforementioned evidence gave Bennet a reason to personally dislike Palin and that it was therefore more likely that he intentionally or recklessly, rather than inadvertently, connected her to the Loughner shooting. Furthermore, to a *reasonable juror*, the threat to Senator Bennet just prior to the Loughner shooting might have heightened James Bennet’s sensitivity to stories about political shootings, making more likely the possibility that he learned of the crosshairs map controversy. Were the jury to draw such an inference, it would likely bear upon the credibility of Bennet’s assertions

that he was unaware of the controversy when drafting the challenged statements.
[Emphases added.]

This “reasonable juror” test is in fact a Rule 104(b) analysis. The issue to the *Palin* court is whether a reasonable juror could have found it to be relevant, even though there was no conditional fact. If this analysis is correct, there is no need to have a separate analysis for conditional relevance. That only confuses matters. But also, if this is the right approach, it should actually be in rule text, because, as stated above, there is no specific guidance in the rule on the standard for determining questions of basic relevance.

Should There Be an Amendment?

It is fair to state that the concept of conditional relevance is at least confusing --- not that it can’t be understood as a concept, just that it can’t be understood why it makes a difference. Is that enough to justify an amendment? Perhaps this is one of the oft-occurring situations in which a change what would have made a lot of sense in 1975 is not as optimal after 50 years. If courts are essentially dealing with conditional relevance as a concept that makes a difference, but in fact it really doesn’t make a difference because all relevance questions are decided under the same standard, why rock the boat?

An answer could be that putting all questions of relevance under the same standard of proof would make Rule 104 determinations more understandable and uniform. It would certainly be easier for students and new lawyers seeking to master the Federal Rules of Evidence. It’s not great for the integrity of the rules when the message is, “don’t worry about conditional relevance, it is meaningless, just understand the lower standard of proof where the ultimate determination is and should be made by the jury.”¹

It’s for the Committee to determine whether eliminating the concept of conditional relevance is an improvement that is worth the effort.

III. Drafts

A. Adding the Preponderance of the Evidence Standard to Rule 104(a)

Rule 104. Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege. Unless otherwise provided in these rules, the proponent must establish the existence of a preliminary fact by a preponderance of the evidence.

¹ That’s a quote from me, today, to my Evidence class at NYU. My experience indicates that Rules 104(a) and (b) are the rules that cause the most confusion for those trying to master Evidence. Small wonder, because neither of them provide sufficient, or accurate, information as to how they apply.

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Committee Note

The amendment codifies the holding in *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), that preliminary questions of fact under Rule 104(a) are to be determined by a preponderance of the evidence. The Committee has determined that codification would be useful because there has been some confusion about the applicable standard of proof for preliminary questions. See the 2023 amendment to Rule 702.

Some situations call for a lower standard of proof for a preliminary question, ordinarily because on those questions, the jury is in as good a position as the court to determine the contested fact, and there is little to no risk that the jury will be misled or subject to unfair prejudice in making the determination. See Rules 104(b), 602, 901 and 1008.

B. Adding the Preponderance Standard to Rule 104(a) and Eliminating Conditional Relevance in Rule 104(b)

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Rule 104. Preliminary Questions

19 (a) **In General.** The court must decide any preliminary question about whether a
20 witness is qualified, a privilege exists, or evidence is admissible. In so deciding,
21 the court is not bound by evidence rules, except those on privilege. Unless
22 otherwise provided in these rules, the proponent must establish the existence of a
23 preliminary fact by a preponderance of the evidence.

24 (b) **Relevance That Depends on a Fact.** ~~When the relevance of evidence depends~~
25 ~~on whether a fact exists, proof must be introduced sufficient to support a finding~~
26 ~~that the fact does exist. A court must find that evidence is relevant if, under the~~
27 ~~totality of circumstances, there is sufficient evidence to support a finding that it~~
28 makes a fact of consequence more or less probable than it would be without the
29 evidence. The court may admit the proposed evidence on the condition that the
30 proof be introduced later.

31

Committee Note

32 Two changes are made to Rule 104. First, the amendment codifies the holding in
33 *Bourjaily v. United States*, *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), that
34 preliminary questions of fact under Rule 104(a) are to be determined by a preponderance
35 of the evidence. The Committee has determined that codification would be useful because
36 there has been some confusion about the applicable standard of proof for preliminary
37 questions. See the 2023 amendment to Rule 702.

38 Some situations call for a lower standard of proof for a preliminary question,
39 ordinarily because on those questions, the jury is in as good a position as the court to
40 determine the contested fact, and there is little to no risk that the jury will be misled or

subject to unfair prejudice in making the determination. See Rules 104(b), 602, 901 and 1008.

Second, Rule 104(b) eliminates the concept of “conditional relevance.” There is no reason for special treatment of facts that are conditionally relevant, because in almost all cases, the relevance of a particular fact is dependent on a showing of other facts and so the relevance is “conditional.” Moreover, if the existence of one fact is conditionally relevant upon another, the result is that both facts are “conditionally relevant.” See Ronald Allen, *The Myth of Conditional Relevance*, 25 Loyola L. Rev. 871-884, 879 (1992) (“Evidence is relevant only because there is an intermediate premise or set of premises that connects the evidence to some proposition involved in the litigation. But if determining the relevance of evidence always requires relying on some intermediate premise, no distinction can be drawn between relevancy and conditional relevancy.”). Providing a uniform approach to all relevant evidence avoids confusion, especially because most courts currently use the same permissive approach to all relevant evidence, conditional or not.

The reference to “the totality of the circumstances” indicates that in deciding whether evidence is relevant, the judge must not only take into account the evidence formally in the record, but also the likely background knowledge and experience of a reasonable juror from the area where trial is being held. For example, suppose a trial concerns the cause of a large explosion and fire. The plaintiff claims that the defendant mishandled nitrogen fertilizer containing ammonium nitrate. A witness is asked whether such a fertilizer was stored on the premises and an objection on relevancy is made. If the trial is in a rural state with a large farming population, the trial judge would overrule the objection because a reasonable person from that population would likely know the dangerous properties of the material. If, by contrast, the trial were in an urban area, the judge would likely conclude that evidence of the dangerous properties must be entered into the record to satisfy the requirement of relevancy.

Reporter’s Note: If Rule 104(b) is changed, there is a question as to whether a conforming change will have to be made to Rule 1008, which specifically refers to Rule 104(b). If so, the change would not be substantive.

Rule 1008. Functions of the Court and Jury

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:

- (a) an asserted writing, recording, or photograph ever existed;
- (b) another one produced at the trial or hearing is the original; or
- (c) other evidence of content accurately reflects the content.

It would seem that no change to the rule is necessary, because the standard to be employed—sufficient to support a finding --- is retained in Rule 104(b). All that is done is to extend the prima

facie proof standard to all questions of relevance. If some change is necessary, it would be to add the prima facie proof standard between the em-dashes where Rule 104(b) currently resides. Like this:

* * * But in a jury trial, the jury determines — ~~in accordance with Rule 104(b)~~ subject to the court's finding of evidence sufficient to support a finding — any issue about whether: * * *

TAB IX

FORDHAM

University School of Law

Lincoln Center, 150 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposals by an Invited Practitioner for Amending the Rules as Applied to Civil Cases
Date: October 1, 2025

With the suggestion and agreement of the Chair, the Reporter sought input from a number of highly-regarded practitioners on their “wish list” for amending the Evidence Rules as applied to civil cases. The reason for this outreach was to put together a small panel of practitioners to talk about their proposals at the Fall 2025 meeting. The Committee often sponsors a panel at the Fall meeting, as a way to obtain background information as well as new agenda items.

It turned out that the panel could not be put together for a number of reasons. That said, one practitioner contacted for the panel did have two concrete proposals. That practitioner is Chloe Chetta, a partner in the New Orleans law firm Barrasso, Usdin, Kupperman, Freeman & Sarver, L.L.C. (and a former clerk for Judge Steven Higginson of the Standing Committee and Judge Sarah Vance, the Chair of the Civil Rules Committee). We are grateful to Ms. Chetta for her efforts.

This memorandum sets forth Ms. Chetta’s proposals and provides some background and comment on them. These proposals are not action items. They are preliminary. The question for the Committee is whether it is interested in seeing one or both of these proposals further developed for consideration at the next meeting.

I. Proposal to Amend Rule 803(6) to Cover Records from One Entity That Are Incorporated Into the Records of Another

The first proposal concerns a possible amendment to the business records exception, Rule 803(6), which currently provides as follows:

- (6) *Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:
 - (A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge;

- (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- (C) making the record was a regular practice of that activity;
- (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
- (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Ms. Chetta suggests that the Committee consider making the concept of an “incorporated business record” more explicit in 803(6). The fact situation is fairly common. The records are proffered by one company but they originally created by another. Examples include legal bills in the records of the client; toll receipts in the business records of the entity that paid the receipts; and situations where one company merges into another. In each of these cases, the foundation witness is from the company where the records currently are. Ms. Chetta states that “various courts have addressed [the question of incorporated records] with varying results, but I’m not sure there’s one unifying test.”

Ms. Chetta provides the following examples:

- *Christian Faith Fellowship Ch. v. Adidas AG*, 841 F.3d 986, 990 (Fed.Cir.2016): “The business records exception ‘does not require that the document actually be prepared by the business entity proffering the document.’ When a business relies on a document it has not itself prepared, two factors bear on the admissibility of the evidence as a business record: ‘(1) that the incorporating business rely upon the accuracy of the document incorporated[:]; and (2) that there are other circumstances indicating the trustworthiness of the document.’”
- *United States v. Duncan*, 919 F.2d 981, 986 (5th Cir.1990): “[T]he defendants argue that the insurance company records contained other unauthenticated medical records and statements by doctors. They contend that these medical records and statements are hearsay not falling within the business records exception of rule 803(6). We reject this argument. The insurance companies compiled their records from the business records of hospitals. Because the medical records from which the insurance company records were made were themselves business records, there was no accumulation of inadmissible hearsay. There is no requirement that the witness who lays the foundation be the author of the record or be able to personally attest to its accuracy. Furthermore, there is no requirement that the records be created by the business having custody of them. Instead, the primary emphasis of rule 803(6) is on the reliability or trustworthiness of the records sought to be introduced. The district court has great latitude on the issue of trustworthiness. Hospitals and insurance companies rely on these records in conducting business.”

Ms. Chetta states that “the insurance companies and hospital examples seem particularly apt because hospitals will often incorporate records from other medical providers, and insurance companies will often incorporate records from all sorts of other organizations—medical professionals for personal injury claims, federal and state regulators, businesses for lost income

claims, etc. Insurance companies are often not seeking officially certified documents from these organizations during their investigation of an insurance claim, but need to be able to talk about the information they relied on in adjusting the claim, especially in states with bad-faith insurance adjusting statutes that impose steep penalties for perceived delay.”

Reporter’s Comments:

The text of Rule 803(6) does not prohibit qualification of another party’s records, so long as the foundation witness is qualified to do so. But there is nothing in the Rule that specifically addresses the incorporation issue, and it is a frequently occurring situation, so it would appear that adding language to cover it might be useful.

Amendment would not be a necessity if the courts have come to a uniform approach to admitting third-party records. This is not the only instance in which courts have covered a problem with case law in the absence of rule text. In fact, though, the standards employed by the courts are not completely uniform. While most courts focus on whether the records are *incorporated and relied upon* by the entity producing the records, some courts, like *Duncan*, above, speak more broadly about trustworthiness. Using trustworthiness is somewhat flimsy, and moreover it would appear to put the burden on the proponent of showing that the incorporation was somehow untrustworthy --- because the only mention of trustworthiness in the rule is in terms of the opponent showing factors of untrustworthiness. Other courts have also applied a trustworthiness standard to the question of incorporation. *See MRT Constr. Inc. v. Hardrives, Inc.*, 158 F.3d 478 (9th Cir. 1998) (legal bills of a construction company were admissible as business records, and could be qualified by the CEO of the company; the company relied on the bills as statements of fees owed to the firm, *and had a substantial interest in them being accurate and so they were trustworthy*); *F.T.C. v. Direct Marketing Concepts, Inc.*, 624 F.3d 1, 17 n. 15 (1st Cir.2010) (holding that business records which included data entered by a third party were “so intimately integrated into” the records of the offering party that “they were reliable enough to be admissible”).

A focus on trustworthiness is misguided because Rule 803(6) does not require the proponent to show that the record is trustworthy. It requires the proponent to show that the record was prepared in the ordinary course of regularly conducted activity. If that is shown, then the burden shifts to the opponent to show untrustworthiness. *See United States v. Freidin*, 849 F.2d 716 (2nd Cir. 1988) (business records are not admissible upon a showing of “trustworthiness” but rather upon a showing of regularity).

Other courts rely more specifically on *incorporation and reliance* as the exclusive grounds for qualifying the third party record. Obviously these are factors that indicate trustworthiness, but there is no deeper inquiry into trustworthiness of a specific record. Rather these requirements are tied to the Rule’s concern that the records are actually those to which the foundation witness can testify --- records of the company that holds them. This analysis is more within the spirit of Rule 803(6) --- which is, as stated above, not a search for trustworthiness, but rather a search for *regularity*, with a possible enquiry into *untrustworthiness*. *See, e.g., United States v. Jakobetz*, 955 F.2d 786 (2nd Cir. 1992) (bridge toll receipt incorporated into a business’s expense account records was admissible because the company relied upon the record); *Smith v. Seeco, Inc.*, 922 F.3d 406 (8th Cir 2019) (royalty statement from another company to the landowner was admissible because

the landowner incorporated it into her own records and relied on it); *United States v. Doe*, 960 F.2d 221, 223 (1st Cir.1992) (Breyer, J.) (“The fact that the [hearsay evidence] ... had earlier been the record of a different business ... is irrelevant. Because it was relied upon by the [current testifying party], the ... record was integrated into the records of the [testifying party], along with the additional handwritten notation.”). So, an amendment might be appropriate to mandate a uniform test for the oft-recurring situation in which records are prepared by one entity and produced by another.

It should be emphasized that incorporated records, to be admissible, must themselves have been made in the regular course of regularly conducted activity. If not, then the whole basis for admitting the records fails. *See, e.g., United States v. Ismoila*, 100 F.3d 380 (5th Cir. 1996) (in a credit-card fraud prosecution, affidavits submitted to the bank from credit card holders indicating that their cards were stolen were not admissible as business records, because the holders had no business duty in filling out the affidavits, and did not file regularly); *United States v. Vigneau*, 187 F.3d 70, 75–77 (1st Cir.1999) (information on an intake form prepared by an individual could not be admitted as a business record of the firm, as the individual was an outsider, not making regular reports, and with no business duty to the business).

Assuming an amendment would be useful, what might it look like? It turns out that adding another, relatively detailed, requirement to the rule is unlikely to be elegant. Here is a possibility:

- (6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:
 - (A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
 - (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit = including a record made by another person or entity, if the record is relied upon and incorporated into the records of the person or entity producing the record;
 - (C) making the record was a regular practice of that activity;
 - (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
 - (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

II. Proposal to Add Production in Discovery as a Concession of Authenticity

Ms. Chetta suggests that a party's production of a document during discovery should usually suffice for authentication of that document. She advocates "something akin" to Texas Rule of Civil Procedure 193.7, which provides

A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless—within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used—the party objects to the authenticity of the document . . . stating the specific basis for objection.

She argues that the Texas procedural rule "eliminates parties' largely baseless authenticity objections to information the objecting party has itself produced in discovery, especially when those objections are likely to hinder parties' ability to introduce relevant, contemporaneous contextual evidence in cases based on older, but not 'ancient' records." She relates her experience of lawyers "who take control of their clients' documents/records early on in a case—objecting on both authenticity and hearsay grounds to documents that those attorneys specifically identified from their clients' records and produced in discovery." She notes that "some might argue that the client should be able to authenticate the documents in deposition testimony, [but] the testimony usually comes out as 'I don't know . . . We gave the attorneys full access to our files, so whatever we have, they had, and I assume they produced it to you.'" She then can't depose the attorney who selected the relevant documents from their client's files, and also "can't chase down every potential witness identified in a favorable document when FRCP 30(a)(2)(A)(i) limits me to 10 depositions." She notes that the problem arises most often "when businesses or business assets are bought, sold, or transferred, and the current company officers or custodians don't actually know the people in any of the documents, which prior company those people might have worked for," etc.

Ms. Chetta notes that one federal court cited the Texas rule in support, and simply relied on concepts of fairness to find authenticity. The court in *Musket Corp. v. Suncor Energy (U.S.A.) Mktg., Inc.*, CV H-15-100, 2016 WL 6704163, at *3 (S.D. Tex. Nov. 15, 2016) stated as follows:

[I]t defies logic for Musket [the objecting party] to argue that emails that it produced from its employees are *not* authentic. Musket has an obligation under the federal rules to produce documents as they are kept in the usual course of business. While the court understands that Musket is simply attempting to hold Suncor [the proponent of the evidence] to authenticate its evidence, in this case the declaration provided indicating that Musket produced these documents—along with the Musket Bates number that is clearly affixed to each document—is sufficient because there is no concern that the emails that Musket produced from its employees are not what they purport to be.

Ms. Chetta further cites the following authorities for the principle that production in discovery concedes the authenticity of what was produced:

- *Nola Fine Art, Inc. v. Ducks Unlimited, Inc.*, 88 F. Supp. 3d 602, 607 (E.D. La. 2015) (Vance, J.) (“Ducks Unlimited produced the email to plaintiffs in discovery and therefore cannot seriously dispute the email’s authenticity.”).

- *John Paul Mitchell Sys. v. Quality King Distributors, Inc.*, 106 F.Supp.2d 462, 472 (S.D.N.Y.2000) (“The Court finds that these documents are authentic based upon two factors: the act of production by CDM’s corporate representative and the documents themselves.”). [Note that this court does not say that production is sufficient in itself.]

Reporter’s Comments:

There is nothing in the authenticity rules providing that production in discovery concedes authenticity. But there is a fair amount of case law authority on the subject. Most of the cases *do not* hold that production is sufficient in itself, but that the act of production is an important indication that the item is authentic. Here is some circuit court case law, with the qualifications in *italic*:

- *Joseph v. Lincare, Inc.*, 989 F.3d 147 (1st Cir. 2021) (it was error to exclude documents as inauthentic when the defendant produced them in discovery; the defendant never made any suggestion that it had produced inauthentic documents: “When a party in response to discovery requests points to a document that appears on its face to be a business record of the producing party, the other parties should be able to treat the document as authentic *unless someone offers some reason to think otherwise*, before it is too late to do something about it.”).

- *Lexington Ins. Co. v. Western Pa. Hospital*, 423 F.3d 318 (3rd Cir. 2005) (internal business form was authenticated by its having been produced in response to discovery requests, which was sufficient *in the absence of any dispute as to whether it was filled out for a typical use*).

- *Snyder v. Whittaker Corp.*, 839 F.2d 285 (5th Cir. 1988) (notes that were produced by a corporation during discovery, *and that the corporation did not deny were written by one of its senior employees*, were sufficiently authenticated).

- *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998 (9th Cir. 2004) (documents were properly authenticated by the testimony that they were produced by the defendants in response to a document discovery request).

- *Law Co., Inc. v. Mohawk Constr. & Supply Co.*, 577 F.3d 1164 (10th Cir. 2009) (“documents produced during discovery *that are on the letterhead of the opposing, producing party* are authentic per se for purposes of Federal Rule of Evidence 901”).

The state of the law on authentication through production is discussed in Capra, Grimm and Joseph, *Best Practices for Authenticating Digital Evidence*, 69 Baylor Law Review 1 (2017):

If a document request is sufficiently descriptive, production in response to that request may serve in itself to authenticate the email, as the act of production

may be a concession that the document is what the party asked for—and thus is what the party says it is. The act of production can constitute a statement of a party-opponent and consequently admissible evidence of authenticity. See Fed.R.Evid. 801(d)(2).¹ Authentication has also been found when an adversary produces in discovery a third party’s email received by the producing party in the ordinary course of business, and the email is offered against the adversary.²

But some production may be so massive and extensive that it cannot be concluded that production itself is a concession of authenticity. Moreover, it is possible that a party might knowingly produce inauthentic documents, such as a forged check, and such production could not be found to be tantamount to authentication. Nonetheless, production in discovery is *at a minimum relevant to authenticity in the vast majority of cases*.³

So there is plenty of authority for the principle that production in discovery is an important factor in proving authenticity. But as seen above, not all cases have adopted a bright line rule that production automatically concedes authenticity. If there is merit to a case by case approach, then if the ground of production is added to the list of authenticity examples in Rule 901(b), the text must be more nuanced than “an item produced in response to a discovery request.” Note that the statement in the above text, to the effect that production is “at a minimum relevant to authenticity” is not enough to justify a new illustration in Rule 901(b). All those illustrations, when met, constitute a sufficient showing of authenticity. A statement in text that “production in discovery is relevant” to authentication has no place in a freestanding provision in Rule 901(b).

Another complicating factor is whether production should equal authentication in a criminal case. Obviously there are sensitive issues involving the Fifth Amendment privilege that may warrant limiting any rule on production to civil cases. The Supreme Court has held that a compelled act of production could in some cases violate the Fifth Amendment because the act of production constitutes an admission that the documents produced are authentic, and that fact could in some cases tend to incriminate the producing party. *Doe v. United States*, 487 U.S. 201 (1988). Production in criminal discovery is of course not compelled but based on a principle of reciprocity. Nonetheless, if this proposal proceeds, more thought has to be given to its applicability in criminal cases.

¹ See, e.g., *AT Engine Controls Ltd. v. Goodrich Pump & Engine Control Sys., Inc.*, 2014 U.S. Dist. LEXIS 174535 (D. Conn.) (collecting cases holding that production of emails in discovery constitutes a concession of authenticity); *Nola Fine Art, Inc. v. Ducks Unlimited, Inc.*, 2015 U.S. Dist. LEXIS 17450 (E.D. La.) (“[Defendant] produced the email to plaintiffs in discovery and therefore cannot seriously dispute the email’s authenticity”).

² *Broadspring, Inc. v. Congoo, LLC*, 2014 U.S. Dist. LEXIS 177838 (S.D.N.Y. Dec. 29, 2014) (third party emails sent to a party in the ordinary course of business and produced by the party in litigation are sufficiently authenticated by the act of production when offered by an opponent, but hearsay and other admissibility objections as to the third parties’ statements must separately be satisfied).

³ See, e.g., *American Federation of Musicians v. Paramount Pictures Corp.*, 903 F.3d 968 (9th Cir. 2018) (e-mail sent by a studio employee was properly authenticated; it was produced by the studio during discovery, included the employee’s e-mail signature, and included the studio’s e-mail address).

What could an amendment grounding authenticity on production in discovery look like? Here are two possibilities. One is an addition to Rule 901(b)(4), and the other is a new illustration, Rule 901(b)(11). They are both set out below, for ease of reference but they wouldn't be proposed together:

Rule 901. Authenticating or Identifying Evidence

(a) **In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) **Examples.** The following are examples only—not a complete list—of evidence that satisfies the requirement:

(1) ***Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.

(2) ***Nonexpert Opinion About Handwriting.*** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) ***Comparison by an Expert Witness or the Trier of Fact.*** A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances, including whether the item was produced in response to a valid discovery request [in civil cases].

(5) ***Opinion About a Voice.*** An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) ***Evidence About a Telephone Conversation.*** For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) ***Evidence About Public Records.*** Evidence that:

- 29 (A) a document was recorded or filed in a public office as authorized by
30 law; or
- 31 (B) a purported public record or statement is from the office where items
32 of this kind are kept.
- 33 (8) *Evidence About Ancient Documents or Data Compilations.* For a
34 document or data compilation, evidence that it:
- 35 (A) is in a condition that creates no suspicion about its authenticity;
- 36 (B) was in a place where, if authentic, it would likely be; and
- 37 (C) is at least 20 years old when offered.
- 38 (9) *Evidence About a Process or System.* Evidence describing a process or
39 system and showing that it produces an accurate result.
- 40 (10) *Methods Provided by a Statute or Rule.* Any method of authentication or
41 identification allowed by a federal statute or a rule prescribed by the
42 Supreme Court.
- 43 (11) *Production in Discovery.* [In a civil case,] the fact that the item was
44 produced in response to a valid discovery request, unless the opponent has
45 substantial grounds for contesting the concession.

Reporter's comments on the possible change:

The addition to Rule 901(b)(4) is preferable. That rule provides a ground of authenticity based on all the circumstances. Courts have significant discretion to consider relevant factors under that rule.⁴ Production in discovery is, as discussed above, circumstantial evidence of authenticity. The court will be free to consider it as one among other factors and would presumably have discretion in some cases to find that production is the most significant or even the only factor to rely upon in its finding of authenticity. Given that most courts seem to need something more than production during discovery, whereas some courts find production sufficient on its own at least in some cases, it appears that adding the factor to the Rule 901(b)(4) grab bag is ideal.

The new subdivision alternative raises the difficulty of expressing the additional factors that a court might find relevant to the authenticity inquiry. The case law above indicates that at least these following factors might be relevant: 1) whether the producer's letterhead is on the item; 2) whether the producing party has a legitimate argument that production does not amount to authenticity; 3) whether the item was prepared for a typical use. One can think of other assurances that might arise. Thought would have to be given to whether the language above covers the bases.

⁴ See, e.g., *United States v. Myers*, 294 F.3d 203 (1st Cir. 2002) (noting the wide discretion of the court in considering circumstantial factors under Rule 901(b)(4)).

All this assumes that it would be problematic to provide that production in discovery is per se sufficient evidence of authenticity. If a per se rule is found appropriate, then the proper drafting solution would be to add a new illustration, Rule 901(b)(11), which would provide simply:

(11) *Production in Discovery.* In a civil case, the fact that the item was produced in response to a valid discovery request.

It does seem drastic, though, to have a bright line rule, given the intricacies of discovery, especially in complex cases. One would have to worry about inadvertent disclosures, with Rule 502-type arguments, as well as production of admittedly inauthentic items that are nonetheless relevant. Accordingly, it seems appropriate to take the more nuanced approach.

III. Conclusion

If the Committee is interested in further considering an amendment to cover one or both of the above proposals, I will conduct further research, including a review of state provisions, and prepare the relevant Committee Note or Notes for the next meeting. In particular, on the second proposal regarding production and authenticity, more thought and research is required into whether any such provision should extend to criminal cases.

I would like to express my thanks to Ms. Chetta for taking the time to prepare such thoughtful proposals for the Committee.

TAB X



Date: August 28, 2025

To: Advisory Committees on Rules of Practice and Procedure

From: Tim Reagan (Research)
Maureen Kieffer (Education)
Christine Lamberson (History)
Federal Judicial Center

Re: Federal Judicial Center Research and Education

This memorandum summarizes recent efforts by the Federal Judicial Center relevant to federal-court practice and procedure. Center researchers attend rules committee, subcommittee, and working-group meetings and provide empirical research as requested. The Center also conducts research to develop manuals and guides; produces education programs for judges, court attorneys, and court staff; and provides public resources on federal judicial history.

RESEARCH

Current Research for Rules Committees

Intervention on Appeal

At the request of the Appellate Rules Committee, the Center conducted research on interventions on appeal and submitted its report to a subcommittee.

Attorney Admissions

The Center provides the standing rules committee's subcommittee on attorney admissions with occasional research support.

Complex Criminal Litigation

As suggested by the Criminal Rules Committee, the Center is developing a collection of resources on complex criminal litigation as one of its curated websites.

Completed Research for Other Judicial Conference Committees

Review of Local District and Appellate Rules Governing Redaction of Private Information in Federal Court Filings

At the request of the Judicial Conference Committee on Court Administration and Case Management, the Center reviewed local rules in the

federal district courts and courts of appeals to identify rules requiring redaction of specified private information from court filings (www.fjc.gov/content/394726/review-local-district-and-appellate-rules-governing-redaction-private-information).

Review of Local Bankruptcy Rules, Orders, and Procedures Governing Redaction of Private Information in Federal Court Filings

At the request of the Judicial Conference Committee on Court Administration and Case Management, the Center reviewed local rules in the federal bankruptcy courts to identify rules requiring redaction of specified private information from court filings (www.fjc.gov/content/394727/review-local-bankruptcy-rules-orders-and-procedures-governing-redaction-private).

Supplemental Analysis of Unredacted Social Security Numbers in Federal Court PACER Documents

The Center examined unredacted Social Security numbers in its 2024 study of public filings to determine whether unredacted personally identifiable information is more common in particular types of court filings and proceedings (www.fjc.gov/content/394725/supplemental-analysis-unredacted-social-security-numbers-federal-court-pacer). The analysis was prepared at the request of the Judicial Conference Committee on Court Administration and Case Management.

Appeals of Sua Sponte Remand Orders in Class Action Fairness Act (CAFA) Removals, 2014–2023

Prepared for the Committee on Federal–State Jurisdiction, this study examines how often sua sponte remands were ordered in putative class actions removed to federal court on Class Action Fairness Act (CAFA) grounds and how often appeals of those sua sponte remand orders were sought (www.fjc.gov/content/393642/appeals-sua-sponte-remand-orders-class-action-fairness-act-cafa-removals-2014-2023).

Current Research for Other Judicial Conference Committees

Evaluation of a Pilot Program in Which Comparative Sentencing Information Is Incorporated Into Presentence Investigation Reports

At the request of the Committee on Criminal Law, the Center is evaluating a two-year pilot program in which selected districts incorporated comparative sentencing information from the Sentencing Commission’s Judiciary Sentencing Information (JSIN) platform into presentence investigation reports.

The Privacy Study: Unredacted Sensitive Personal Information in Court Filings

At the request of the Committee on Court Administration and Case Management, the Center is conducting research on unredacted personal information in public filings. The Center presented to the rules committees' privacy working group a report on the role unredacted Social Security numbers play in civil, criminal, and appellate litigation suggesting that Social Security numbers usually appear in public filings because they appear in documents presented to the courts as exhibits for other reasons.

Case Weights for Bankruptcy Courts

The Center has collected data and is conducting analyses for updating bankruptcy-court case weights. Case weights are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships. The research was requested by the Committee on Administration of the Bankruptcy System.

Other Completed Research

Consumer Bankruptcy Law: Chapters 7 & 13, Second Edition

This monograph provides an overview of consumer bankruptcy law and describes the statutory framework for bankruptcy relief under Chapters 7 and 13 of the Bankruptcy Code, Title 11 of the U.S. Code (www.fjc.gov/content/393646/consumer-bankruptcy-law-chapters-7-13-second-edition).

Condensed Report on 2023 Federal Judiciary Workplace Survey

This condensed report presents a detailed summary of the results of the 2023 Workplace Survey for the Federal Judiciary, which was conducted by the Federal Judicial Center for the Federal Judiciary Workplace Conduct Working Group (www.fjc.gov/content/392606/condensed-report-2023-federal-judiciary-workplace-survey). Center staff prepared this report at the working group's request to provide context for the working group's recommendations stemming from the survey results (*Report of the Federal Judiciary Workplace Conduct Working Group on the Judiciary's 2023 National Workplace Survey*, www.uscourts.gov/administration-policies/workplace-conduct-federal-judiciary#workinggroup). The survey obtained information on the number of employees who said they had experienced wrongful conduct and input about how well the procedures for addressing wrongful conduct are working. It also obtained information about the judiciary's general working environment to inform the working group about the judiciary's progress toward the goal of its strategic plan, updated in 2020, to provide an "exemplary workplace free from discrimination, harassment, retaliation, and abusive conduct," where all employees are treated with dignity and respect.

JUDICIAL GUIDES

In Preparation

Manual for Complex Litigation

The Center is preparing a fifth edition of its *Manual for Complex Litigation* (fourth edition, www.fjc.gov/content/manual-complex-litigation-fourth).

Reference Manual on Scientific Evidence

The Center is collaborating with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (third edition, www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1).

Manual on Recurring Issues in Criminal Trials

The Center is preparing a seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* (sixth edition, www.fjc.gov/content/manual-recurring-problems-criminal-trials-sixth-edition-0).

Benchbook for U.S. District Courts

The Center is preparing a seventh edition of its *Benchbook for U.S. District Courts* (sixth edition, www.fjc.gov/content/benchbook-us-district-court-judges-sixth-edition).

HISTORY

Exhibits

The Center's History website includes comprehensive exhibits, presenting data about the federal judiciary at various points in its evolution, aimed at helping a general-public audience understand these topics (www.fjc.gov/history/exhibits). Two recently posted exhibits are *Prohibition in the Federal Courts: A Timeline* (www.fjc.gov/history/exhibits/prohibition-in-federal-courts-timeline) and *The Judiciary Act of 1801* (www.fjc.gov/history/exhibits/judiciary-act-1801). In addition, the Center has updated *Demography of Article III Judges, 1789–2024* (www.fjc.gov/history/exhibits/graphs-and-maps/demography-article-iii-judges-1789-2024-introduction).

Spotlight on Judicial History

Since 2020, the Center has posted twenty-six short essays about judicial history on a variety of topics (www.fjc.gov/history/spotlight-judicial-history). Recently posted is “Supreme Court Meeting Places” (www.fjc.gov/history/spotlight-judicial-history/supreme-court-meeting-places).

Summer Institute for Teachers

In June 2025, the Center collaborated with the ABA to present a weeklong professional-development conference for teachers, focusing on three famous historical trials: *United States v. Anthony*, the flag-salute cases, and the Chicago Seven trial. The Center presents information about these and other

famous federal trials on its website (www.fjc.gov/history/cases/famous-federal-trials).

EDUCATION

Specialized Workshops

Workshop on Science-Informed Decision-Making

Presented in June by the FJC and the Center for Law, Brain & Behavior at Massachusetts General Hospital, this three-day program provided guidance on how judges and probation and pretrial services officers could incorporate behavioral science into their decision-making in criminal cases that unfold outside of the context of problem-solving courts and where diversion may not be an option.

Emerging Issues in Neuroscience for Federal Judges

A two-day, in-person judicial seminar held in cooperation with the American Association for the Advancement of Science explored developments in neuroscience and the role that neuroscience may play in making legal determinations, from the admissibility of evidence to decisions about criminal culpability.

Distance Education

Evaluating Historical Evidence

The Center is offering judges a six-part, interactive online series that provides tools for managing cases with significant historical evidence. Historians discuss historical methodology and provide practical tips on evaluating historical evidence, whether presented in the form of expert witnesses, amicus briefs, or litigant arguments. The first four episodes were “An Introduction: What Do Historians Do and How Do They Do It?”; “Researching the Law on the Ground: How Do Historians Research and Come to Understand Encounters with the Courts?”; “The U.S. Government and ‘the People’: How Do Historians Research Activists’ and Administrators’ Influence in Shaping Law and Policy in Practice?”; and “How Do Historians Use Context to Move Beyond ‘Anecdotes’ to Good History?”

Court Web

This periodic webcast included as recent episodes “Supreme Court Review, October 2024 Term” (featuring Erwin Chemerinsky and Paul Clement) and “The Bail Reform Act in Practice” (featuring Central District of Illinois Judge Jonathan E. Hawley and Middle District of Florida Magistrate Judge Anthony Porcelli).

Wm. Matthew Byrne, Jr. Judicial Clerkship Institute for Career Law Clerks

Presented in collaboration with the Wm. Matthew Byrne, Jr. Judicial Clerkship Institute at Pepperdine University’s Caruso School of Law, this program was formerly conducted as a two-day, in-person program, but it

was conducted in 2025 as four weekly online sessions. It offered information on managing high-profile cases and serving self-represented parties, and it also offered summaries of pending Supreme Court cases.

General Workshops

National Workshops for Trial-Court Judges

Three-day workshops are held for district judges in even-numbered years and annually for magistrate judges and bankruptcy judges. The 2025 workshop for bankruptcy judges included a plenary session on the application of evidence rules to bankruptcy cases.

Circuit Workshops for U.S. Appellate and District Judges

The Center has recently put on a three-day workshop for Article III judges in the Second Circuit.

Workshop for Federal Court Mediators

In August, the Center held a three-day workshop for court mediators.

National Conference for Appellate Staff Attorneys

The Center put on this three-day workshop in June.

Orientation Programs

Orientation Programs for New Trial-Court Judges

The Center invites newly appointed trial-court judges to attend two one-week conferences focusing on skills unique to judging. The first phase includes sessions on trial practice, case management, and judicial ethics. In addition, district judges learn about the sentencing process, magistrate judges learn about search warrants, and bankruptcy judges learn about the bankruptcy code. The second phase includes sessions on such topics as civil-rights litigation, employment discrimination, security, self-represented litigants, relations with the media, and ethics.

Orientation for New Circuit Judges

Orientation programs for new circuit judges include a three-day program hosted by the Center and a program at New York University School of Law for both state and federal appellate judges.

Orientation for New Term Law Clerks

The Center offers online orientation to new term law clerks. Phase I is offered before the clerkship begins, and phase II is offered after the clerkship has begun.

From: Daniel Capra

Sent: Tuesday, November 4, 2025 1:15 PM

To: Jesse Furman; Richard Sullivan; Valerie Caproni; John Siffert; Elizabeth Shapiro; Rene Valladares; Mark Massa; Edmund Sargus; Liesa Richter; James Dever; Cathy Struve; Timothy Lau; Carolyn Dubay

Subject: Suggestions on Rule 707 to be reviewed at the Committee meeting tomorrow

Judge Furman has suggested that something be added to the Committee Note to more fully address the concern expressed in some articles that 707 will provide a way to avoid expert testimony by using a machine instead. I don't think this is a justifiable concern at all but I completely agree that the concern is out there. So, for the discussion tomorrow, please review the following addition to the Committee Note that is found at line 32 of page 138 of the Committee Note:

Change to Committee Note to provide more emphasis that the rule is not an invitation to use machines instead of live experts:

This rule is not intended to encourage parties to opt for machine-generated evidence over live expert witnesses. Indeed the point of this rule is to provide reliability-based protections when a party chooses to proffer machine-generated evidence instead of a live expert. It is anticipated that these reliability standards will be difficult to meet—and sometimes impossible to meet—without presenting expert testimony. For example, without expert testimony it may be very difficult for a proponent to establish that the data used in the process is not biased and is sufficient for the task performed. Likewise, it may be difficult to establish a rate of error, and the explicability of the process, in the absence of expert testimony.

In addition, a few days ago I sent three other suggestions for changes to Rule 707, and I am placing them here as well for ease of reference (one email instead of two):

Committee Note to address concerns about lack of cross-examination of machine-generated output at trial (suggestion by John Siffert).

Under this rule, machine learning output will be regulated pre-trial by the court in essentially the same way as expert testimony. But there may well be a difference at trial when machine-based evidence is found by the court to be admissible under this rule. A human expert can be cross-examined, and the jury will be able to weigh the expert's testimony accordingly. But it may be more difficult to attack the weight of machine output. The opponent may be able to introduce reports and data, as well as expert testimony, to undermine the output. But in the end, the inability to cross-examine is a concern. Accordingly, the court should consider providing a limiting instruction that machine-generated evidence is subject to error and that evidence should not be assumed to be reliable – or unreliable – simply because it was produced by a machine.

Committee Note to be added to bullet points regarding factors for determining the reliability of machine-learning (suggestion by Professor Andrea Roth)

- Considering whether the process has been validated by independent researchers, and whether research licenses are available to independent researchers. The less available and familiar the tool and its reliability limits are to the public, the more critical it will be for the proponent to show independent validation studies and that licenses are available to independent researchers.

Change to text as an alternative to an exclusion of “simple scientific instruments” (suggested by Professor Roth)

This rule does not apply to the output of simple scientific instruments when the machine that generated the evidence is accessible to, and the extent of its reliability well known to, the general public.